

No. 88-192-CSX
Status: GRANTED

Title: McKesson Corporation, Petitioner
v.
Division of Alcoholic Beverages and Tobacco,
Department of Business Regulation of Florida, et al.

Docketed:
July 30, 1988

Court: Supreme Court of Florida

Counsel for petitioner: Robertson, David G.

Counsel for respondent: Mellichamp III, Joseph C., Farr
III, H. Bartow

Entry	Date	Note	Proceedings and Orders
1	Jul 30 1988	G	Petition for writ of certiorari filed.
3	Aug 11 1988		Order extending time to file response to petition until September 12, 1988.
4	Sep 8 1988		Brief of respondents Florida Division of Alcoholic Beverages and Tobacco, et al. in opposition filed.
5	Sep 20 1988		Reply brief of petitioner McKesson Corp. filed.
6	Oct 26 1988		DISTRIBUTED. November 10, 1988
7	Nov 14 1988		Petition GRANTED. The case is consolidated with 88-325 and a total of one hour is allotted for oral argument. *****
9	Nov 28 1988		Order extending time to file brief of petitioner on the merits until January 7, 1989.
10	Jan 5 1989		Joint appendix filed.
		*	Volumes I and II
11	Jan 5 1989		Brief of petitioner McKesson Corp. filed.
13	Jan 6 1989		Brief amicus curiae of Committee on State Taxation filed. VIDED.
14	Jan 6 1989		Brief amicus curiae of Tax Executives Institute, Inc. filed. VIDED.
12	Jan 9 1989		Record filed.
		*	Certified copy of original record received. (Box).
16	Jan 19 1989		Order extending time to file brief of respondent on the merits until February 21, 1989.
17	Jan 19 1989	G	Motion of respondents for divided argument filed.
18	Jan 23 1989	G	Motion of petitioners for divided argument filed.
19	Feb 3 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 22, 1989. (4TH CASE)
20	Feb 21 1989		Motion of respondents for divided argument GRANTED. The request for additional time for oral argument is denied.
21	Feb 21 1989		Motion of petitioners for divided argument GRANTED. The request for additional time for oral argument is denied.
22	Feb 21 1989		Brief of respondent Division of Alcoholic Beverages filed.
23	Feb 21 1989		Brief amici curiae of Natl. Conference of State Legislatures, et al. filed. VIDED.
24	Feb 21 1989		Brief amici curiae of California, et al. filed. VIDED.
25	Feb 24 1989		CIRCULATED.
26	Mar 13 1989	X	Reply brief of petitioner McKesson Corp. filed.
27	Mar 22 1989		ARGUED.
28	Mar 28 1989		Lodging received. (10 copies).
29	Mar 29 1989		Letter from respondents received and distributed.
30	Jul 3 1989		This case is restored to the Calendar for reargument. The parties are directed to brief and argue the

Entry	Date	Note	Proceedings and Orders
			<p>following questions in addition to the issues already briefed: 1. "When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?" 2. "May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?" This case is allotted 45 minutes for reargument.</p>
31	Aug 11 1989		Brief amicus curiae of U.S. Oil & Refining Co. filed.
32	Aug 14 1989		Brief of petitioner McKesson Corporation filed.
34	Aug 15 1989		Brief amicus curiae of Crow Tribe of Indians filed. VIDE.
33	Aug 16 1989		Brief amicus curiae of Caterpillar, Inc. filed.
37	Aug 17 1989		Brief amici curiae of American Trucking Associations, Inc., et al. filed.
36	Aug 30 1989		Order extending time to file brief of respondent on the merits until September 20, 1989.
38	Sep 20 1989		Brief of respondents on reargument filed.
39	Sep 20 1989		Brief amici curiae of Natl. Conf. of State Legislatures, et al. on reargument filed.
40	Sep 20 1989		Brief amici curiae of Georgia, et al. filed.
41	Sep 26 1989		SET FOR REARGUMENT WEDNESDAY, DECEMBER 6, 1989. (3RD CASE)
42	Sep 29 1989	G	Motion of California, et al. for leave to file a brief as amici curiae, out-of-time, filed.
43	Oct 16 1989		Motion of California, et al. for leave to file a brief as amici curiae, out-of-time, GRANTED.
44	Oct 19 1989		CIRCULATED.
45	Oct 20 1989	X	Reply brief of petitioner McKesson Corporation filed.
47	Dec 6 1989		REARGUED.

88-192
No.

Supreme Court, U.S.

FILED

JUL 30 1988

JOSEPH F. SPANIOL, JR.

CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF
THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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QUESTION PRESENTED

1. Under what circumstances may a state that enacts a tax that is unconstitutional under the Commerce Clause refuse to grant an injured taxpayer any refund of the collected taxes?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner McKesson Corporation, the respondents Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida, and intervenors Jacquin-Florida Distilling Company, Inc. and Todhunter International, Inc.

The respondents before this Court include the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida.

Petitioner's Rule 28.1 list is attached as Appendix A.

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In the Supreme Court

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OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF
THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA**

The petitioner McKesson Corporation ("McKesson") respectfully prays that a writ of certiorari issue to review the final decree and opinion of the Supreme Court of Florida, entered in this action on February 18, 1988.

OPINIONS BELOW

The Supreme Court of Florida's final decree and opinion is reported at 524 So. 2d 1000, and is reprinted as Appendix B, 2a.

The Florida circuit court's order, which has not been reported, is reprinted as Appendix C, 24a.

JURISDICTION

The Supreme Court of Florida entered its final decree on February 18, 1988, and denied McKesson's timely motion for rehearing on May 2, 1988. McKesson's motion for rehearing is reprinted as Appendix D, 29a. The order denying McKesson's motion and the Court's mandate are reprinted as Appendix E-F, 36a-38a.

McKesson invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the United States Constitution's Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. The action also involves sections 564.06 and 565.12, Florida Statutes (1985). The Florida statutory provisions are reprinted as Appendix H, 44a.

STATEMENT OF THE CASE

The Florida Products Exemption

Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), declaring a Hawaii liquor tax exemption for local products unconstitutional under the Commerce Clause, Florida's alcoholic beverage laws granted an

excise tax exemption to beverages manufactured and bottled in Florida from Florida products ("Florida Products Exemption"). (Appendix G, 39a) The Florida legislature adopted the Florida Products Exemption "to protect and encourage state industry," *Jacquin-Fla. Distilling Corp. v. Dep't of Business Regulation*, 356 So. 2d 340, 341 (Fla. Dist. Ct. App. 1978). The similarity between the Florida law and the Hawaii law that this Court declared unconstitutional in *Bacchus* prompted the Florida legislature to alter the language of the Florida statutes.

The Revised Florida Products Exemption

During the legislative committee hearings to consider changes to the old Florida Products Exemption, Florida industry lobbyists pressed the legislature to maintain the protection of local industry. In response, the legislature enacted sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). (Appendix H, 44a) The legislature removed the word "Florida" from the sections and, instead, substituted language identifying certain agricultural products whose use would entitle the manufacturers and distributors to tax advantages.

One Florida sponsor of the new legislation explained to a committee that the changes were designed "simply to retain what we have done for the last twenty years." Another legislator explained that the drafters tried to "structure the law so that the word 'Florida' is not in there and yet you are using primarily Florida products." He noted, "I don't think anyone really argues with that."

The Revised Florida Products Exemption provided tax advantages for alcoholic beverages manufactured exclusively from Florida's predominant products, citrus and sugarcane. In addition, Florida, which cannot produce the most common grape species used to manufacture wine and wine coolers, *Vitis Vinifera*, designated for preferential treatment the grape species that Florida does produce. The new Florida tax statutes also established certain criteria for denying the tax advantages to out-of-state firms even if they used the favored products.

McKesson's Action

On September 3, 1986, McKesson, which distributed alcoholic beverages at wholesale in Florida and which paid excise taxes under sections 564.06 and 565.12, Florida Statutes (1985), filed an action in Florida state court challenging Florida's alcoholic beverage tax scheme as unconstitutional under the federal and state constitutions. Specifically, McKesson alleged that the tax scheme discriminated against interstate and foreign commerce in violation of the federal Constitution's Commerce Clause and Import-Export Clause. McKesson in its Complaint prayed that the court declare the Florida statutes unenforceable and also requested a refund of the unconstitutionally collected taxes.

McKesson filed motions for partial summary judgment and for a preliminary injunction. On March 20, 1987, the circuit court entered an order that found that McKesson has standing to challenge the constitutionality of the tax statutes and that declared unconstitutional those portions of the statutes that grant tax exemptions or preferences. The court's order included a preliminary injunction that enjoined the State from enforcing the unconstitutional statutory provisions.

McKesson in its motion for partial summary judgment did not raise the issue of McKesson's entitlement to a refund of the unconstitutional taxes. Nevertheless, the circuit court proceeded to resolve the issue, stating in its order that its declaration of unconstitutionality would operate only prospectively.

On the same day, March 20, 1987, the State filed a Notice of Appeal, which automatically caused a stay of the circuit court's order under Fla. R. App. P. 9.310(b)(2). On April 15, 1987, McKesson filed its notice of cross appeal. McKesson in its cross appeal challenged the circuit court's decision to restrict its declaration of unconstitutionality and thereby bar retroactive relief. On April 13, 1987, the District Court of Appeal, First District, certified that the case on appeal was of great public importance requiring immediate resolution by the Florida Supreme Court.

On February 18, 1988, a unanimous Florida Supreme Court issued its final decree, definitively disposing of all the legal and factual issues in the case. The Supreme Court affirmed the lower

court's order declaring unconstitutional those portions of the Revised Florida Products Exemption that granted tax exemptions or preferences. The Court found that "the tax scheme at issue places a clear discriminatory burden on interstate commerce . . ." and thereby conferred a competitive advantage on local industry. (Appendix B, at 11a) Quoting from *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980), the Florida Court acknowledged "the 'general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.'" (Appendix B, at 18a) The Court cited *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and specifically stated that the Florida law imposed a discriminatory burden similar to that in *Hunt*. (Appendix B, at 16a)

Despite the Florida Supreme Court's finding that the challenged tax scheme "clearly raises [McKesson's] relative cost of doing business" and otherwise disadvantaged McKesson in the Florida market (*Id.* at 17a), the Supreme Court refused to permit McKesson to seek any refund of taxes. The Court did not acknowledge that McKesson had never had an opportunity in the circuit court to address the issue of retroactive relief. Rather, the Court affirmed the circuit court's decision to deny any retroactive relief, citing, in two sentences, "equitable considerations." (*Id.* at 21a)

On March 3, 1988, McKesson, in a motion for rehearing, asserted that the Florida Supreme Court's peremptory denial of any relief for the constitutional injury McKesson sustained during the period that Florida collected discriminatory taxes overlooks both federal constitutional law and the Florida Supreme Court's own previous decisions. (Appendix D, 29a) McKesson also noted that no Florida court had ever permitted McKesson to present evidence on the effect of the discriminatory taxes on its business. (*Id.* at 32a) McKesson asked the Florida Supreme Court to determine that McKesson is entitled under both federal constitutional law and state law to receive a tax refund, and to remand the case to the lower court to receive evidence to determine the amount of an appropriate refund. Alternatively, McKesson asked

the Court to remand the case to the lower court to hear evidence on the issue of McKesson's competitive injury and then to weigh the particular equities in determining the measure of any relief. (*Id.* at 34a-35a)

On May 2, 1988, the Florida Supreme Court denied, without an opinion, McKesson's motion for rehearing and issued its mandate.

The Revised, Revised Florida Products Exemption

After the Florida Supreme Court declared unconstitutional the Revised Florida Products Exemption, the Florida legislature recognized that Florida's alcoholic beverage tax statutes no longer discriminated against out-of-state commerce and no longer favored Florida products. The Florida Supreme Court's decision in this case had excised the Florida tax statutes' discriminatory provisions so that the statutes imposed the same tax on out-of-state products as on local products. Therefore, a few months after the Florida Supreme Court's decision, the Florida legislature enacted a new revised tax scheme. The new Florida tax scheme taxes alcoholic beverages produced in Florida at one rate and taxes alcoholic beverages produced out-of-state at another rate, many times higher. (Appendix I, 56a)

REASONS FOR GRANTING THE WRIT

I

THIS COURT'S COMMERCE CLAUSE DECISIONS HAVE NOT PREVENTED FLORIDA AND OTHER STATES FROM DENYING TAXPAYERS EFFECTIVE RELIEF FOR DISCRIMINATORY STATE TAXATION

Under the Commerce Clause, each state may not "legislate according to its estimate of its own interests [and] the importance of its own products . . ." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting Story, *The Constitution*, §§ 259, 260). However, state legislatures, which reflect the interests of their constituents, often legislate in response to protection-

ist pressures. The legislatures' protectionist acts threaten our national common market.

Indeed, this Court's Commerce Clause decisions recognize that state legislatures understandably respond to constituent pressures and regularly act to protect the parochial interests within their states. As out-of-state businesses generally cannot exert counterbalancing pressures, state legislatures often enact legislation that promotes local commerce at the expense of interstate commerce. Therefore, this Court consistently has recognized the need for judicial vigilance in enforcing the Commerce Clause. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981); *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). Since judicial review under the Commerce Clause "rests on the premises that unaccountable power is to be carefully scrutinized and that legislators are accountable only to those who have the power to vote them out of office, it is inevitable that this approach counsels frequent and probing judicial intervention. . . ." L. Tribe, *American Constitutional Law* § 6-5 at 411 (2d ed. 1988).

While state legislatures respond to political pressures supporting protectionism, state courts, under the federal Constitution, are obligated to check discrimination and protect the rights of parties engaged in interstate commerce. In numerous Commerce Clause cases, this Court has established parameters for states' taxation of interstate commerce. Moreover, in this century, the Court has addressed the issue of the appropriate remedy for discriminatory taxes collected in violation of federal law.

In *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912) (finding a tax an unconstitutional burden upon interstate commerce), Justice Holmes stated:

[i]t is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the state's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

In *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), the Court determined that "a denial by a state court of a recovery of taxes

exactd in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the 14th Amendment."

In *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), the Court stated that "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid," but rather is entitled to obtain a refund of the excess taxes. *See also Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 343 (1964) (affirming a refund of taxes on basis of violation of Export-Import Clause).

However, despite state courts' obligation to enforce the Constitution and provide a remedy for discriminatory taxation, state courts often resist granting tax refunds to injured taxpayers. In numerous cases, state courts have determined that the states unconstitutionally collected taxes, but nevertheless have permitted the states to retain the unconstitutional taxes. *See, e.g., Am. Trucking Ass'n v. Gray*, 746 S.W. 2d 377 (Ark. 1988); *Nat'l Can Corp. v. State Dep't of Revenue*, 749 P.2d 1286 (Wash. 1988), *appeal dismissed*, 108 S. Ct. 2030 (1988); *Penn Mut. Life Ins. Co. v. Dep't of Licensing & Regulation*, 412 N.W. 2d 668 (Mich. Ct. App. 1987); *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), *appeal dismissed*, 107 S. Ct. 1949 (1987); *Private Truck Council of Am., Inc. v. Secretary of State*, 503 A. 2d 214 (Me. 1986), *cert. denied*, 476 U.S. 1129 (1986); *Metropolitan Life Ins. Co. v. Comm'r of Dep't of Ins.*, 373 N.W. 2d 399 (N.D. 1985); *Salorio v. Glaser*, 461 A. 2d 1100 (N.J. 1983), *cert. denied*, 464 U.S. 993 (1983).¹

¹ In *Am. Trucking Ass'n v. Gray*, 746 S.W. 2d 377 (Ark. 1988), for example, the Supreme Court of Arkansas stated that "'whatever chill was imposed on interstate trade is in the past.'" *Id.* at 379 (quoting from *Nat'l Can Corp. v. State Dep't of Revenue*, 749 P.2d 1286 (Wash. 1988)). The Arkansas Court failed to note that since taxpayers invariably pay the state taxes before challenging them, an unconstitutional tax scheme always imposes the "chill" on interstate trade in the past.

In this case, the Florida Supreme Court held that the Revised Florida Products Exemption violated the Commerce Clause but the Court refused even to allow McKesson the opportunity to present evidence of the corporation's economic injury during the period of the unconstitutional discrimination. The Florida Court, like other state courts, rejected retroactive relief. While the Court's decision protected the state treasury, the Court essentially nullified the Commerce Clause's protection for McKesson and other parties engaged in interstate commerce.

The Florida Court's decision and other state court decisions denying any retroactive relief for discriminatory taxation do not effectively enforce the Commerce Clause's proscription against protectionism. By embracing doctrines of nonretroactivity, states may avoid any liability for imposing a discriminatory burden on interstate commerce. Without any fear of liability, any state may enact successive discriminatory statutes that emasculate the Commerce Clause's protection for our national common market.

This Court need not rely on hypothesis. Florida has provided a case study. Several months after this Court's decision in *Bacchus* declared the discriminatory Hawaii tax unconstitutional, the Florida legislature replaced the original discriminatory Florida tax scheme with a revised discriminatory tax scheme. A few months after the Florida Supreme Court declared the revised Florida tax scheme unconstitutional, but rejected any measure of liability, the Florida legislature enacted a revised, revised discriminatory tax scheme. Florida's original tax scheme imposed significantly greater costs on interstate commerce than on local commerce; Florida's revised tax scheme continued to impose significantly greater costs on interstate commerce than on local commerce; and now the revised, revised tax scheme continues the tradition.

For example, under Florida's original tax scheme, a distributor of locally produced wine that contained 10 percent alcohol by weight paid no Florida taxes on the wine. A distributor of California wine that contained 10 percent alcohol by weight paid \$2.25 per gallon in Florida taxes.

Under Florida's revised tax scheme, a distributor of locally produced wine that contained 10 percent alcohol by weight paid

no Florida taxes on the wine. A distributor of California wine that contained 10 percent alcohol by weight paid \$2.25 per gallon in Florida taxes.

Under Florida's revised, revised tax scheme, a distributor of locally produced wine that contains 10 percent alcohol by weight pays \$0.25 per gallon in Florida taxes on the wine. A distributor of California wine that contains 10 percent alcohol by weight pays \$2.25 per gallon in Florida taxes. Apparently, the more things change, the more they remain the same.

McKesson has litigated the constitutionality of Florida's alcoholic beverage tax scheme for almost two years. However, even after a Florida Supreme Court decision holding the Revised Florida Products Exemption unconstitutional, any distributor of out-of-state products still does not enjoy parity with local competitors. The Florida Supreme Court's denial of retroactive relief implicitly motivates the legislature to continue to discriminate against interstate commerce. The Florida Court's decision in concert with the Florida legislature's enactments has effectively denied McKesson any relief in this case—either retroactive or prospective—for Florida's violation of the Commerce Clause.

Florida's manipulation of principles of retroactivity and prospectivity serves as a paradigm for other states interested in avoiding any liability for violating the Commerce Clause. Further, McKesson's experience in challenging Florida's Commerce Clause violation, to date, serves as a disincentive to other parties contemplating a challenge to other Commerce Clause violations. See, e.g., Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965).

In *Nippert v. City of Richmond*, 327 U.S. 416, 433-34 (1946), this Court observed that provincial interests can exert powerful legislative pressure in support of discrimination against interstate commerce to the advantage of local interests. The Court stated:

[t]he problem comes down therefore to whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a

manner which avoids the evils forbidden by the commerce clause. . . .

Id. at 434. In fact, state legislatures will not be at pains to avoid enacting taxing measures that violate the Commerce Clause if they may enact such laws with impunity. If states may pass laws that discriminate against interstate commerce, to the advantage of local business, and then avoid liability for any measure of relief for the harm to taxpayers engaged in interstate commerce, the states will have little incentive to enact constitutional, rather than protectionist, legislation.

II

THIS COURT SHOULD ARTICULATE THE CONSTITUTIONAL LIMITATIONS ON STATES' RETENTION OF UNCONSTITUTIONAL, DISCRIMINATORY TAXES

To date, this Court has declined to resolve federal constitutional issues regarding the appropriate remedy for a taxpayer injured by a state's violation of the Commerce Clause. The Court has preferred to allow the state courts to address the federal and state issues in the first instance. *See, e.g., Tyler Pipe Industries, Inc. v. Wash. State Dep't of Revenue*, ___ U.S. ___, 107 S. Ct. 2810, 2822-23 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984).² However, as state courts increasingly refuse to enforce the Commerce Clause effectively by rejecting retroactive relief for discriminatory taxes, this Court should intervene to decide whether the federal Constitution demands greater consideration of our national interest in interstate commerce.

² In contrast to *Bacchus*, in this case, the Florida Supreme Court did resolve McKesson's right to relief. The Florida Court, which did not find a federal right to relief, also denied any state law right to relief by reinterpreting its earlier decisions that had provided a refund remedy to litigants who had paid unlawful taxes. *See, e.g., Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 7 (Fla. 1972); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993, 995 (Fla. 1976); *Osterndorf v. Turner*, 426 So. 2d 539, 541, 545 (Fla. 1982); *Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 580 (Fla. 1984); *Colding v. Herzog*, 467 So. 2d 980, 983 (Fla. 1985).

The Florida Supreme Court and other state courts, seeking to protect state treasuries in Commerce Clause cases, too often have ignored the threat to interstate commerce.

The complete denial of refunds resolves the tension between these competing interests entirely in favor of the state. Such an unbalanced resolution threatens the very purpose of the commerce clause. Guidance from the [Supreme] Court is needed with respect to the appropriate balance between the refund rights of the taxpayer and the rights of the state.

Tatarowicz, Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause, 41 Tax Lawyer 103, 118-19 (1987-1988).³

Without this Court's guidance, state legislatures will continue to react to parochial pressures by enacting protectionist statutes. State courts will continue to protect state treasuries by declining to order any effective enforcement of the Commerce Clause. The state courts' denial of retroactive relief, at least in some cases, will provide an incentive for successive unconstitutional discrimination. Further, as this Court has recognized, when protectionism in one state spawns protectionism in other states, our nation experiences the balkanized commerce that Commerce Clause doctrine is designed to prevent. "Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the [Commerce] Clause protects." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (citation omitted). *See also* Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 77-78 (1988).

³ The Florida Supreme Court and other state courts, in rejecting taxpayers' claims for retroactive relief for unconstitutional tax statutes, have adopted an all or nothing approach. The Florida Court, for example, did not balance the equities to decide whether a limited refund or an installment refund would vindicate Commerce Clause concerns but minimize state treasury problems.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court adopted an analysis for determining whether a judicial decision should be applied retroactively or only prospectively. *Chevron* set forth a balancing test by which a court that announced a clearly new principle of law could avoid "penalizing" a party that had relied to its detriment on the preceding principle or rule. The Court in *Chevron* and in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), acknowledged the departure from the Blackstonian conception in *Norton v. Shelby County*, 118 U.S. 425, 442 (1886), that an unconstitutional statute, in all cases and in all respects, "is, in legal contemplation, as inoperative as though it had never been passed." See *Lemon*, 411 U.S. at 198; 1 W. Blackstone, *Commentaries* *70. This Court's later decisions have confirmed that *Chevron* continues to govern the question of retroactivity in civil actions. See *Griffith v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708, 713 n.8 (1987); *United States v. Johnson*, 457 U.S. 537, 563 (1982).

If this Court, implicitly, has directed state courts to apply the *Chevron* analysis in determining whether to grant retroactive relief for unconstitutional, discriminatory taxation, the Florida Supreme Court and other state courts are unaware. "Since many state courts have applied their own standards [rather than *Chevron*] to determine retroactivity of a decision holding a state tax unconstitutional, the issue would seem to cry out for clarification by the Court." Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 140-41 (1987-1988).

If the Florida Supreme Court had applied *Chevron* in this case, the Court would not reasonably have denied relief. The Florida Court's analysis would not have proceeded beyond *Chevron*'s threshold test for nonretroactivity—whether the Florida Court's decision represented a new principle of law. See *Chevron*, 404 U.S. at 106-07; *United States v. Johnson*, 457 U.S. 537, 550 n.12, 551 (1982).⁴ In its opinion, the Florida Court never suggests that

⁴ The Florida Court cited *Lemon v. Kurtzman*, 411 U.S. 192 (1973), without discussion. However, in *Lemon* as in *Chevron*, the Court

its unanimous declaration of the unconstitutionality of the Revised Florida Products Exemption established a new principle of law, either by overruling past precedent or by deciding an issue of first impression. Instead, the Court stated that it based its decision on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977).⁵

Instead, without mentioning *Chevron*, the Florida Supreme Court summarily dismissed McKesson's claim for relief. The Florida Supreme Court knew that no Florida court had ever seriously considered the federal Commerce Clause interests in McKesson's claim for retroactive relief for the unconstitutional tax statutes. The circuit court had resolved the question of retroactive relief without the parties' even presenting the issue and without receiving evidence on the issue. The Florida Supreme Court affirmed the lower court's denial of relief in two sentences concerning two "equitable considerations." Neither "consideration" withstands any scrutiny.

First, the Florida Supreme Court adopted an argument that would allow any Florida court in any case to prevent a taxpayer from recovering any portion of an unconstitutional tax. The Court stated that a state agency had implemented the "tax preference scheme . . . in good faith reliance on a presumptively valid statute." (Appendix B, at 21a) Of course, all Florida statutes, under Florida law, are presumptively valid until the Florida Supreme Court holds otherwise. See *A.B.A. Industries, Inc. v. Pinellas Park*, 366 So. 2d 761, 763 (Fla. 1979). Therefore, the Court's

avoided inequitable harm to parties that would have resulted from applying a new principle of law retroactively. The Florida Court in this case did not establish a new principle of law.

⁵ The Florida Department of Business Regulation must not have been surprised when it read the Florida Supreme Court's opinion declaring the statutes unconstitutional. Before Florida enacted the challenged tax scheme, the Department warned in a memorandum that the legislature's preservation of the Florida Products Exemption's discriminatory effect in the revised tax scheme would leave its constitutionality "substantially in doubt" and would expose state revenues to taxpayers' suits for refunds.

"consideration" would bar any taxpayer's claim for any refund of an unconstitutional tax.

Second, the Florida Supreme Court adopted an argument that ignored the economic effect of discriminatory taxes on interstate commerce. The Court stated that McKesson, if allowed to apply for a refund, "would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." (Appendix B, at 21a)

Neither the Florida Supreme Court nor any other Florida court ever questioned that McKesson had suffered an economic loss as a result of the unconstitutional Florida taxes. Indeed, every party to the litigation acknowledged that the Florida legislature enacted the discriminatory tax scheme to promote the use of Florida products. (*Id.* at 17a-18a) The Florida statutes simply made no sense unless they effectively advantaged Florida distributors of Florida products and disadvantaged McKesson and other distributors of other states' products. See generally Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1110-1143 (1986). The Florida Supreme Court specifically noted that McKesson had sustained competitive injury as a result of the discriminatory tax scheme's raising McKesson's relative cost of doing business in Florida. (*Id.* at 17a) McKesson suffered an economic injury. If McKesson raised its prices to cover the discriminatory tax burden, the corporation lost market share to the favored competitors who did not have to cover the same tax costs. On the other hand, if McKesson did not raise its prices to cover the discriminatory taxes, the corporation's profits decreased.

Nevertheless, the Florida Supreme Court relied on a speculative "pass-on" argument in denying McKesson the opportunity to prove the economic facts of an unconstitutional discrimination. McKesson asked the Florida Supreme Court to permit the circuit court to consider McKesson's arguments concerning the unconstitutional taxes' specific economic impact on McKesson. The Court refused.

This Court's analysis of similar economic situations refutes the Florida Supreme Court's speculative argument. In *Bacchus Im-*

ports, Ltd. v. Dias, 468 U.S. 263, 267-68 n.7 (1984), the Court recognized that Hawaii's discriminatory alcoholic beverage tax injured the out-of state taxpayers when their products were taxed but local products were not. The Court, rejecting Hawaii's standing arguments, noted that "even if the tax is completely and successfully passed on, it increases the price of [the wholesalers'] products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business."⁶ In this case, the Florida Supreme Court protected Florida's state treasury by denying McKesson the opportunity to present evidence of the adverse competitive impact of Florida's unconstitutional taxes. While states do, in fact, have legitimate concerns regarding disruptions to state budgets and preserving state treasuries, the Commerce Clause historically has enforced our overriding national interest in free, unrestricted trade among the states. See *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). The federal constitutional interest in the Commerce Clause as a restraint on discriminatory state legislation is significant.

The Court in *Chevron* presumably did not replace the old rule demanding full retroactivity in all cases so that states could substitute another inexorable rule denying any retroactive relief in any tax refund claim against a state that has enacted unconstitutional tax statutes. In light of the Florida Supreme Court's and other state supreme court's decisions, this Court should articulate

⁶ This Court has rejected similar pass-on arguments in antitrust cases. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-43 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 491-94 (1968). In *Hanover Shoe*, 392 U.S. at 493, the Court stated that—

[e]ven if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.

the federal Constitution's limitations on the states' retention of unconstitutional taxes.

CONCLUSION

Only this Court can provide federal constitutional guidance to ensure that state courts enforce the Commerce Clause in reviewing taxpayers' claims for relief from unconstitutional state tax statutes. The Florida Supreme Court's rejection of any retroactive relief to McKesson, without any serious consideration of the economic effect of the unconstitutional tax, squarely raises the issue of the federal Constitution's limitations on the states in their review of such claims. Petitioners in other cases in recent years have asked this Court to address the issue. McKesson respectfully submits that the Court needs to speak.

Dated: July 28, 1988

Respectfully submitted,

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APPENDIX A

**Petitioner McKesson Corporation's
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries)
and Affiliates**

Adam Rack Distributors, Inc.
Armor All Products Corporation
Armor All Products of Canada, Inc.
Armor All Products GmbH
APC Chemicals, Inc.
City Properties, S.A.
Corporacion Bonima, S.A.
Comercial Farmaceutica Interamericana, S.A.
Comercial Interamericana, S.A. (Dom. Rep.)
Comercial Interamericana, S.A. (El Salvador)
Comercial Interamericana, S.A. (Guatemala)
Corporacion Interamericana, S.A.
Distribuidora Farmaceutica Calox Colombiana, S.A.
Investigaciones Farmoquimicas De Colombia, S.A.
Intercal, Inc.
Laboratorios Calox, C.A.
Mount Gay Distilleries Limited
Organizacion Farmaceutica Americana, S.A.
PCS, Inc.

APPENDIX B

SUPREME COURT OF FLORIDA

No. 70,368

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF
THE COMPTROLLER, STATE OF FLORIDA, ET AL.,
Appellants/Cross-Appellees,

vs.

MCKESSON CORPORATION, ET. AL,
Appellees/Cross-Appellants.

[February 18, 1988]

EHRlich, J.

On June 29, 1984, the United States Supreme Court decided the case of *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984). In *Bacchus*, the Court struck down a Hawaii alcoholic beverage excise tax which exempted okolehao, a brandy distilled from the root of an indigenous shrub of Hawaii, and fruit wine manufactured in the state as being violative of the Commerce Clause, concluding that the exemption had both the purpose and effect of discriminating in favor of locally produced products. At the time of the *Bacchus* decision, sections 564.06 and 565.12, Florida Statutes (Supp. 1984), granted tax preferred treatment to alcoholic beverages made from certain base agricultural crops grown in Florida and manufactured and bottled in Florida. In response to the *Bacchus* decision, the Florida Legislature amended sections 564.06 and 565.12 in Chapters 85-203 and 85-204,

Laws of Florida. The amended provisions, as codified in sections 564.06 and 565.12 Florida Statutes (1985), among other things, grant exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane and certain grape species, all of which will grow in Florida, or from by-products or concentrates thereof, no matter where the point of manufacture and disallow the tax preference to eligible alcoholic beverages under certain circumstances.

Three separate complaints were filed against the Division of Alcoholic Beverages and Tobacco (DABT) challenging the revised tax preference scheme: one by Tampa Crown Distributors, Inc. and Florida Beverage Corporation, licensed wholesale distributors of alcoholic beverages in Florida, one by McKesson Corporation, also a licensed wholesale distributor and the third by Brown-Forman Corporation, a manufacturer of wine coolers in California who sells its products to wholesalers in Florida for resale in the state. Tampa Crown, Florida Beverage and McKesson challenge the preference and disqualification provisions of both sections 564.06 and 565.12. Brown-Forman challenges only those of section 564.06. The primary claim in all three complaints was that the preference and disqualification provisions under the new tax scheme discriminated in favor of local commerce and against interstate commerce contrary to the mandates of *Bacchus*.

Jacquin-Florida Distilling and Todhunter International, manufacturers who benefit from the challenged preference scheme, intervened as defendants. The DABT raised a number of defenses to each complaint, including a claim that each plaintiff lacked standing to chal-

lenge the provisions in question. Tampa Crown/Florida Beverage and Brown-Forman filed motions for summary judgment and supporting affidavits. McKesson filed a motion for partial summary judgment and preliminary injunction. The trial court entered final summary judgments in favor of Tampa Crown/Florida Beverage and Brown-Forman and entered a partial summary judgment and preliminary injunction in favor of McKesson. In all three judgments, the trial judge found:

These amendments were an effort by the legislature to overcome the constitutional problems in the Florida Alcoholic Beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

The rulings were prospective in nature.

The DABT appealed those portions of the judgements finding the tax preference scheme unconstitutional. McKesson and Tampa Crown filed cross-appeals challenging the prospective nature of the rulings and the denial of their claims for a refund. The District Court consolidated the cases and certified the cause to this Court as involving a question of great public importance requiring immediate resolution. We have jurisdiction, article V, section 3(b)(5), Florida Constitution, and affirm.

First we address the DABT's claim that the appellees lack standing to challenge the "disqualification provisions" because none of them have "alleged or proved any harm to their business flowing from

those provisions." Each of the appellees claims that the *overall* tax preference scheme for alcoholic beverages, which is made up of both the exemption provisions and the disqualification provision of sections 564.06 and 565.12, discriminates against interstate commerce and thus, has an adverse competitive impact on their businesses. It is clear, under the *Bacchus* decision, that, as wholesale distributors and manufacturers of alcoholic beverages who are liable for taxes under Florida's alcoholic beverage tax scheme, the appellees have standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact on their businesses. 104 S.Ct. at 3053; see also *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, 317 (Fla. 1984). Further, we agree that the appellees clearly have standing to assert their constitutional right to engage in interstate commerce free of burdens violative of the commerce clause. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977); *Mapco Inc. v. Grunder*, 470 F. Supp. 401, 405 (N.D. Ohio 1979).

COMMERCE CLAUSE

We next address the merits of the appellees' challenge under the Commerce Clause of the United States Constitution. The United States Supreme Court employs a two-tiered approach to analyzing state economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S.Ct. 2080 (1986). This approach was recently explained by the Court in *Brown-Forman* as follows:

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed. 2d 475 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925); *Edgar v. MITE Corp.*, 457 U.S. 624, 640-43, 102 S.Ct. 2629, 2639-41, 73 L.Ed. 2d 269 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. See *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440-441, 98 S.Ct. 787, 793-94, 54 L.Ed.2d 664 (1978).

106 S.Ct. at 2084-85.

The DABT argues that because any effect which the challenged tax preference scheme might have on interstate commerce is indirect and the tax is applied evenhandedly, the *Pike* balancing approach must be employed in this case. The DABT maintains that under that approach, the trial court erred in finding the challenged tax scheme violative of the Commerce Clause. The appellees, on the other hand, take the position that because the challenged provisions have both the purpose and effect of discriminating against interstate commerce, they were properly struck down by the trial court as "simple economic protectionism." They argue in the alternative that the preference

scheme cannot withstand scrutiny under the *Pike* balancing test. After reviewing the challenged provisions, in light of the record in this case, we agree with the appellees that, even under the *Pike* balancing test, summary judgment was properly entered in their favor.¹

Section 564.06, Florida Statutes (1985) provides in pertinent part:

Excise taxes on wines and beverages; exemptions. —

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of \$2.25 per gallon.

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcoholic content is manufactured exclusively from citrus fruits, varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana* or *Vitis berlandieri*, citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates thereof, except for fla-

¹We find no merit to the DABT's claim that the trial court entered the summary judgments prematurely, thereby failing to allow the Department an adequate discovery period.

voring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of \$3 per gallon, except that this tax shall not be required to be paid upon all wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts.

...

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

...

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural produces used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not be construed as an 'economic incentive or advantage' within the meaning of this subsection.

Section 565.12, Florida Statutes (1985), provides in pertinent part:

Excise tax on liquors and beverages. —

(1) (a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight; except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide

agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2) (a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane by products, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

The appellees maintain that a review of the legislative history of the tax scheme at issue will "reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism." They argue that the exemption scheme was devised "to protect certain Florida agricultural products, and to protect the manufacturers using those products" at the expense of out-of-state products and the manufacturers using those products and that such a discriminatory purpose requires that the tax preference be found a *per se* violation of the commerce clause under *Bacchus*. Because we find that the tax scheme at issue places a clear discriminatory burden on interstate commerce which the state has failed to justify in terms of legitimate local benefits other than the admitted benefits to local industry flowing from the statute, we need not determine whether the challenged provisions were in fact enacted to serve some underlying protectionist purpose. See *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977).

The DABT bases its position that the tax scheme at issue is evenhanded in its application on the fact that an exemption or preference is granted based on the classification of crop from which an alcoholic beverage is made rather than upon the in-state origin of the beverage. Affidavits from several experts establish that 1) citrus and sugarcane are grown in Florida as well as in other areas of the United States and the world and 2) the specified grape species are grown throughout the Southeastern United States and the Atlantic States Regions. The DABT acknowledges that "[w]ithout question, [the]

provisions [at issue] may affect commerce by increasing the use of sugarcane and citrus in the manufacture of beverages," but maintains that "that effect is not a violation of the Commerce Clause." It contends that no "undue burden on interstate commerce" results from "the fact that some crops used in the interstate production of alcohol may be displaced by other crops grown and sold in the interstate market" or from the fact that there may be "a temporary displacement due to market adjustment." For this proposition, the DABT relies on decisions of the United Supreme Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and the Colorado Supreme Court in *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984). We find the *Exxon* decision clearly distinguishable from the situation before us and question whether *Exxon* was properly applied by the Colorado Court in *Archer Daniels*.

In *Exxon*, the Supreme Court upheld a Maryland statute prohibiting producers and refiners of petroleum products – all of which were out-of-state businesses – from retailing gasoline in the state. The statute was enacted in response to perceived inequities in the allocation of petroleum products to retail outlets during the fuel shortage of 1973. In challenging the statute, various oil companies, all of which were engaged in production and refining, as well as in the retail sale of petroleum products, argued that the statute violated the Commerce Clause by discriminating against producers and refiners, all of which were interstate businesses, in favor of independent retailers, most of which were local businesses. In rejecting this contention the Court first found that the statute served the legitimate state purpose of "controlling the gasoline retail market." 437 U.S. at 125. The Court

went on to reject claims of discrimination at both the producing-refining and retailing ends of the petroleum industry. The Court concluded that the statute could not discriminate against interstate petroleum producers and refiners in favor of locally based competition because there were no locally based producers and refiners. The claim of discrimination at the retail level was also rejected because the statute placed "no barriers whatsoever" on competition in local markets by interstate independent dealers. The Court found the situation presented in *Exxon* distinguishable from cases such as *Hunt* and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), in which a state has been found to have discriminated against interstate commerce, because the statute in *Exxon* was found "not [to] prohibit the flow of interstate goods, [to] place added costs upon them, or [to] distinguish between in-state and out-of-state companies in the retail market." 437 U.S. at 126. The Court held that neither the "fact that the burden of a state regulation falls on some interstate companies" nor the fact that "an otherwise valid regulation causes some business to shift from one interstate supplier to another" was enough, under the circumstances, to establish a Commerce Clause violation. 437 U.S. at 126-27. However, the Court noted in footnote 16 of the opinion that:

If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market – as in *Hunt*, 432 U.S., at 347, [97 S.Ct., at 2443] and *Dean Milk*, 340 U.S., at 354, [71 S.Ct. at 297] – the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods.

437 U.S. at 126 n. 16. The Maryland statute had no effect whatsoever on the interstate flow of goods because, regardless of the status of the ultimate retailer, all the petroleum products sold within the state came from out-of-state.

The DABT also relies heavily on the Colorado Supreme Court's decision in *Archer Daniels*. The *Archer Daniels* court upheld a Colorado statute which provided for a sales tax reduction on gasohol containing at least ten percent alcohol derived from agricultural and forest products and limited the reduction to gasohol "produced from no more than three million gallons of alcohol annually from each facility having a design production capacity of seventeen million gallons or less per year." 690 P.2d at 180. As originally enacted, the challenged statute limited the tax break to gasohol made from Colorado-produced alcohol. The statute was challenged as violative of both the Commerce and Equal Protection Clauses of the United States Constitution. The Commerce Clause challenge was based on the fact that no Colorado fuel-alcohol producer had facilities which were large enough to be affected by the production capacity limitation; whereas, several out-of-state producers, including the plaintiff, had facilities with a production capacity of more than seventeen million gallons a year. Relying on the *Exxon* decision, the court concluded that the capacity limitations did not have the effect of discriminating against interstate commerce.

In *Exxon*, the lack of a competitive advantage of in-state independent dealers over out-of-state independent dealers and the fact

that the Maryland regulation at issue had no effect whatsoever on the interstate flow of goods were critical factors. Along with these factors, it appears that both the *Archer Daniels* court and the appellants, sub judice, have overlooked what the United States Supreme court has recognized as the "most critical factor in *Exxon*," the absence of discrimination between interstate and local producer-refiners because there were no local producer-refiners to be favored. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980). In contrast, in the instant case, there are clearly manufacturers and distributors of alcoholic beverages made from local products who receive a competitive advantage from the challenged provisions. We find this distinction to be crucial and agree with the appellees that the challenged tax preference scheme places a burden on interstate commerce similar to that found to be present in the *Hunt* case.

In *Hunt*, the Washington State Apple Advertising Commission challenged as violative of the Commerce Clause a North Carolina statute which prohibited the display of state grades on closed containers of apples sold or shipped into the state. The Court held this facially neutral law had "the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." 432 U.S. at 350. This conclusion was based on the fact that the challenged statute not only raised the cost of doing business for out-of-state dealers, thus, shielding the local apple industry from the competition of Washington apple growers, but also had the effect of "stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system." 432 at 351. Finding no local

flowing from the statute which outweighed the discriminatory burden on interstate commerce and that nondiscriminatory alternatives were available, the *Hunt* Court held that the North Carolina statute violated the commerce clause.

The *Hunt* decision also illustrates that the mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce. See also, *Mapco, Inc. v. Grunder*, 470 F. Supp. 401. In *Hunt*, prior to the challenged statute's enactment, thirteen states shipped apples into North Carolina for sale. Seven of those states, including Washington, had their own grading systems and thus, were disadvantaged by the statute. 432 U.S. at 349. Despite the fact that the six states which did not have a grading system likely benefited from the same "leveling effect which insidiously operate[d] to the advantage of local apple producers," 432 U.S. at 351, the North Carolina statute was found to place a discriminatory burden in interstate commerce.

After considering the probable effect of the challenged tax scheme on both local and interstate commerce, we perceive the same type of discriminatory burden which was recognized in *Hunt*. It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not. It is also undisputed that the beverages targeted for preferential treatment are those manufactured from specified crops, all of which will grow in Florida. It is likewise undisputed that alcoholic

beverages made from citrus, sugarcane and the grape species designated in section 564.06 are regarded by consumers as less desirable than alcoholic beverages manufactured from *vinifera* grapes (which cannot be grown in commercial quantities in Florida) and other agricultural bases. With these facts in mind it becomes quite apparent that, just as the North Carolina statute which was struck down in *Hunt*, Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not made from base crops which are "adapted to growing in Florida". And further, by increasing the cost of beverages made from non-designated crops such as *vinifera* grapes and grains relative to beverages made from the designated preferred crops, the challenged tax preference scheme strips away from manufacturers and distributors of those beverages the competitive and economic advantages which naturally flow from marketing beverages which are considered superior by the public. When such a burden on interstate commerce is demonstrated, "the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. See also, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

The DABT and intervenors, Jacquin and Todhunter, contend that even if the challenged tax preference scheme is found to burden interstate commerce, it must be upheld because it was enacted to further Florida's legitimate state interest in promoting the use of important Florida agricultural crops and the beverages made from those crops. As stated by the DABT, the preference provisions further the

"legitimate state interest" of "enhancing the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing." The DABT maintains that its position that a state's interest in promoting its own products is "legitimate" for commerce clause purposes is supported by the Supreme Court's recognition that "a state may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271; see also *Boston Stock Exchange*, 429 U.S. 318, 336 (1977) (States may structure their tax systems "to encourage the growth and development of intrastate commerce and industry.")

We agree with appellees that the stated purpose of promoting use of Florida products will not justify a discriminatory burden on interstate commerce such as that present in this case. The appellants' argument that any burden on interstate commerce is outweighed by the state's interest in promoting alcoholic beverages "made from crops which Florida is adapted to growing" is at odds with the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44. As the United States Supreme Court has recently noted in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985):

[I]n *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business.

470 U.S. at 876 n.6. (citations omitted)¹

Not only have the appellants failed to show that a legitimate state concern is being served by the challenged provisions, they have also failed to show the stated local interest could not be promoted as well by alternative means which would have "a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Indeed, as pointed out by appellee McKesson, several such alternatives have received express judicial approval under the Commerce Clause. For example, the legislature could have provided property tax relief to Florida manufacturers or growers, as was approved in *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 864 (S.D.N.Y. 1985). Other less discriminatory alternatives include direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for alcoholic beverages made from Florida crops. See *Id.*

We cannot agree with appellant Jacquin's contention that Florida's alcoholic beverage tax scheme is entitled to "great deference because of the Twenty-first Amendment grant to the individual states of extraordinary powers to regulate alcoholic beverages." As noted in *Bacchus*, 468 U.S. at 276, and recently reiterated in *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 106 S.Ct. at 2087, a state

¹We also note that promotion of domestic business or industry, when accomplished by imposing a discriminatory tax against out-of-state competitors, is not a legitimate state purpose under the Equal Protection Clause of the United States Constitution. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985).

statute is entitled to such deference only when it is determined that the challenged law was enacted to carry out a "purpose of the Twenty-first Amendment." No clear concern of the twenty-first amendment has been shown to be furthered by this tax preference scheme which places an otherwise unjustified and therefore excessive burden on interstate commerce.

We also agree with the appellees that even if the overall preference scheme did not violate the commerce clause by placing an excessive burden on interstate commerce, sections 564.06(9)(a) and 565.12(1)(c)1., (2)(c)1. which deny the tax preference to "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries" can not stand. A state may not enact discriminatory legislation in "response to another State's unreasonable burden on commerce." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958 n.18 (1982); *See also Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986) (State may not enact discriminatory legislation designed to coerce another state into desisting from a Commerce Clause violation). The Commerce Clause itself provides the remedy for discriminatory taxes or requirements placed on out-of-state products. *See Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976).

Because we find the challenged tax preference scheme violative of the Commerce Clause and affirm the summary judgment on that basis, we need not address the other challenges raised by the appellees.

TAX REFUND

We next consider whether the trial court erred in giving its ruling prospective effect and thereby denying cross-appellants McKesson and Tampa Crown a refund. McKesson argues that only a refund of the difference between the disfavored product's tax rate and the favored product's tax rate will cure the constitutional injury which it has suffered. It maintains that because it has paid the discriminatory taxes under protest, pursuant to section 215.26, Florida Statutes (1985), it is entitled to a refund under both state and federal law. Cross-appellant Tampa Crown makes a similar argument. We agree with the DABT that the prospective nature of the rulings below was proper in light of the equitable considerations present in this case. *See Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). Not only was the tax preference scheme implemented by the DABT in good faith reliance on a presumptively valid statute, as pointed out by the DABT, if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers.

Accordingly, both those portions of the judgments below finding

[t]hat the provisions of [Florida Statutes] 564.06(2), (3) following the term "\$3.00 per gallon," (4) following the term "3.50 per gallon," (7) and (9) through (13) and [Florida Statutes] 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are . . . unconstitutional on their face,

and those portions giving the rulings prospective effect are affirmed.

It is so ordered.

McDONALD, C.J., and OVERTON, SHAW, BARKETT, GRIMES
and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

Three Consolidated Direct Appeals and a Cross-Appeal of Judgment of
Trial Court, in and for Leon County, Charles E. Miner, Jr., Judge,
Case Nos. 86-2997, 86-3430 & 86-773

Certified by the District court of Appeal, First District, Case Nos. BS-
402, BS-304 & BS-404

Robert A. Butterworth, Attorney General and Daniel C. Brown,
Assistant Attorney General, Tax Section, Tallahassee, Florida, for the
Division of Alcoholic Beverages and Tobacco, Department of Busi-
ness Regulation; John K. Aurell and Ricky L. Polston of Aurell,
Fons, Radey & Hinkle, Tallahassee, Florida and Howell Ferguson,
Tallahassee, Florida, for Jacquin-Florida Distilling Co., Inc; and
Bruce Rogow, Fort Lauderdale, Florida and M. Stephen Turner,
Tallahassee, Florida, for Todhunter International, Inc.

Appellants/Cross-Appellees

David G. Robertson and Neil S. Berinhout of Morrison & Foerster,
San Francisco, California; and Chris W. Altenbernd and Charles A.
Wachter of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.,
Tampa, Florida,

for Appellee/Cross-Appellant, McKesson Corporation

Harold F.X. Purnell of Oertel & Hoffman, P.A., Tallahassee, Florida,

for Appellees, Tampa Crown Distributors, Inc. and Florida
Beverage Corporation

Barry R. Davidson and Cheryl A. Bell of Steel, Hector & Davis,
Miami, Florida,

for Appellee, Brown-Forman Corporation

APPENDIX C

IN THE CIRCUIT COURT OF SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

MCKESSON CORPORATION,

Plaintiff,

vs.

CASE NO. 86-2997

DIVISION OF ALCOHOLIC
BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS
REGULATION, and OFFICE
OF THE COMPTROLLER,
STATE OF FLORIDA,

Defendant.

ORDER ON MOTION FOR PARTIAL SUMMARY
JUDGMENT AND FOR PRELIMINARY INJUNCTION

This matter came to be heard on Motion for Partial Summary Judgment filed by the Plaintiff and the Court having heard argument of counsel and being otherwise advised in the premises hereby finds:

1. Plaintiff is and has been a licensed distributor of beer, wine and distilled spirits in the State of Florida. As a licensed distributor, it

is liable for the payment of alcoholic beverage taxes pursuant to F.S. 564.06 and 565.12 (1985) the legal incidence of which falls on Plaintiff by virtue of its status as a licensed distributor.

2. Plaintiff sells wine subject to the full rates of taxation set forth in F.S. 564.06(1), (2), (3) and (4) and distilled spirits subject to the full rates of taxation set forth in F.S. 565.12(1)(a) and (2)(a). These wines and distilled spirits are not now exempt or entitled to a tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985). These alcoholic beverages are manufactured both in states other than Florida and in foreign countries.

3. Such alcoholic beverages sold by Plaintiff compete in the Florida market place with alcoholic beverages of the same type as referred to in paragraph 2 above but which have been granted a tax exemption or tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985).

4. The Plaintiff has challenged the constitutionality of F.S. 564.06 and 565.12, including the tax preference provisions found in F.S. 564.06(2), 564.06(3) following the term "\$3.00 per gallon," F.S. 564.06(4) following the term "\$3.50 per gallon," 564.06(7), and 564.06(9) through (13) and F.S. 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) (1985).

5. Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held a Hawaii liquor tax exemption for locally produced alcoholic beverages

unconstitutional as a violation of the Commerce Clause, Florida's alcoholic beverage laws granted excise tax exemptions and preferences to alcoholic beverages manufactured or bottled in Florida from Florida grown products. The similarity between these provisions of Florida law, and the Hawaii law struck down in *Bacchus* prompted the Florida Legislature to consider revising the statutes.

6. During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes 91985). The legislature removed the requirement from the former provisions that alcoholic beverages had to be produced from Florida products and manufactured and bottled in Florida, substituted language identifying certain agricultural products whose use in the production of the alcoholic beverages would entitle the manufacturers and distributors to tax preferences and exemptions, and inserted language denying the tax exemption or tax preference in certain circumstances.

7. These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

Based on the foregoing, it is hereby ORDERED and ADJUDGED:

1. That Plaintiff has standing to challenge the constitutionality of the alcoholic beverage tax statutes.

2. That Plaintiff's Motion for Partial Summary Judgment is hereby granted.

3. That the provisions of F.S. 564.06(2), (3) following the term "\$3.00 per gallon," (4) following the term "\$3.50 per gallon," (7) and (9) through (13) and F.S. 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are hereby found to be unconstitutional on their face.

4. That this determination of unconstitutionality shall operate prospectively only from the rendition of this Order.

5. That Plaintiff's Motion for a Preliminary Injunction is hereby granted only to the extent that Defendants' are enjoined from enforcing the statutory provisions declared unconstitutional hereinabove at paragraph 3.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 20th day of March, 1987.

/s/ CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies furnished to:

David Robertson
Bruce Rogow
M. Stephen Turner

Howell L. Ferguson
Daniel C. Brown

APPENDIX D**SUPREME COURT OF THE STATE OF FLORIDA**

No. 70,368

**DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, AND OFFICE OF
THE COMPTROLLER, STATE OF FLORIDA, et al.,
Defendants/Appellants/Cross-Appellees,**

v.

**McKESSON CORPORATION, et al.,
Plaintiff/Appellee/Cross-Appellant.**

**APPELLEE AND CROSS-APPELLANT
McKESSON CORPORATION'S
MOTION FOR REHEARING**

Appellee-Cross-Appellant McKesson Corporation ("McKesson"), by and through its undersigned attorneys, pursuant to Florida Rule of Appellate Procedure 9.330, moves for rehearing. McKesson does not wish to reargue the merits of its case but respectfully believes that the Court has overlooked or misapprehended certain points of law and fact in its peremptory denial of any relief for the constitutional injury McKesson has sustained during the period that Florida has collected discriminatory taxes. McKesson submits that the Court's

decision denying relief overlooks both federal law established in similar cases and this Court's own decisions.¹

The Court in denying McKesson's request for an appropriate refund appears to expand the holding in *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973), such that a heretofore-recognized narrow exception to the doctrine has swallowed the doctrine.² This Court consistently has provided a refund remedy to taxpayers who paid taxes under an unlawful scheme, although the Court has limited that remedy to those taxpayers who actually filed the suit challenging the validity of the tax scheme.³ In *Gulesian*, however, the Court allowed a carefully-reasoned exception.

¹ McKesson will not restate the federal constitutional law arguments that it has already made to this Court. The Court, however, cites *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), in denying McKesson relief. The United States Supreme Court has not in this century permitted a state to collect or retain taxes assessed under an unconstitutional statute. *Lemon* does not hold otherwise. The Court in *Lemon* did not address a taxpayer's claim for relief from a discriminatory tax burden. Rather, the Court allowed payment pursuant to service contracts for services already rendered, even though the Court earlier had declared the contracts unconstitutional. *Lemon* simply cannot be used to authorize Florida to retain taxes that this Court has held were unconstitutionally collected.

² See *Coe v. Broward County*, 358 So.2d 214, 216 (Fla. 4th DCA 1978) (recognizing *Gulesian* as a narrow exception to the rule that a taxpayer is entitled to a refund of taxes paid pursuant to an unlawful assessment).

³ See *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972); *Interlachen Lakes Estates, Inc. v. Brooks*, 341

In *Gulesian*, the circuit court, after "weighing equities and considering the slight benefits to individual taxpayers [affected by the invalid tax]," denied a refund of taxes collected under an unconstitutional statute. *Gulesian*, 281 So.2d at 326. Specifically, the circuit court found that plaintiffs and all other taxpayers had voluntarily paid the tax "without protest and not under compulsion;" that the School Board, which had levied the invalid tax, had relied in good faith on a presumptively valid state statute; and that requiring a refund "in small amounts to over 350,000 Dade County taxpayers would impose an intolerable burden on the School Board." *Id.* This Court agreed with the lower court's specific findings and reasoning and, therefore, affirmed.

In this case, however, the circuit court has not made specific findings regarding McKesson's claim for a refund and could not yet weigh the equities because the circuit court has not yet heard evidence on the issue. McKesson in its motions for partial summary judgment and for a preliminary injunction had not yet raised the issue of an appropriate refund. Therefore, when the circuit court decided to bar any relief for the injury McKesson has sustained during the period that Florida has collected the discriminatory taxes, it acted without first hearing evidence on the refund issue.⁴ McKesson has not had the

So.2d 993, 995 (Fla. 1976); *Osterndorf v. Turner*, 426 So.2d 539, 541, 545 (Fla. 1982); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985).

⁴ McKesson raised the refund issue in this Court, as a cross-appellant, in response to the lower court's statement that its

opportunity to present its evidence to the lower court establishing the effect of the discriminatory tax burden on McKesson's business in Florida, including the effect on McKesson's sales, market share, and profit. In sum, McKesson has never had the opportunity to demonstrate the extent of the very competitive injury that this Court recognized in striking down the unconstitutional statutes.

Unlike the 350,000 taxpayers in *Gulesian* who were only slightly affected by the improper assessment, McKesson, which did pay the challenged tax under protest and did pay under compulsion, has incurred a substantial injury under a discriminatory scheme. Further, the State in this case did not rely on invalid statutes but rather enacted the unconstitutional statutes.⁵

By applying *Gulesian* in this case to bar any remedy, without first instructing the lower court to hear evidence and weigh the particular equities in this case, the Court appears to expand the narrow holding in *Gulesian* to bar any refund of taxes collected under an unconstitutional statute so long as the statute was presumptively valid before it was declared

declaration of unconstitutionality would operate only prospectively, thereby barring any refund.

⁵ McKesson maintains that the State enacted the revised statutes to preserve the protectionism inherent in the former statutory scheme, and acted after the Florida Department of Business Regulation warned in a memorandum that the revised statutes continued the unconstitutional discriminatory effect of the old scheme.

unconstitutional. McKesson submits that under such a doctrine no taxpayer will ever be entitled to a refund for unconstitutional taxes.

The Court's statement that "the cost of the tax has likely been passed on to their customers" (P. 16) should not serve to bar McKesson's opportunity to present evidence on the measure of its injury. First, the circuit court has not heard evidence on this "pass-on" issue. Second, regardless of whether the cost of the discriminatory tax has been passed on to McKesson's customers, McKesson has sustained an economic injury in the competitive marketplace. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the Supreme Court observed: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages."

Whether McKesson raised the price of its products to cover the added tax burden that the discriminatory tax scheme imposed, thereby selling fewer products than it otherwise would have, or did not raise the price of its products to cover the added burden, thereby reducing its profit margin, McKesson has been injured.⁶

⁶ The alcoholic beverage excise tax is significantly different from the general sales tax, which is stated separately from an item's purchase price and for which retailers simply serve as collection agents for the state. See § 212.07(1)(a) and (2), Fla. Stat. (Supp. 1987)

Further, this Court plainly found that McKesson has sustained a competitive injury.

It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not [favored].

(P. 12-13)

The Florida alcoholic beverage tax scheme, by design, has imposed an unconstitutional burden on McKesson by raising its cost of doing business compared to distributors of the favored products. That burden continued even after the lower court declared the discrimination unconstitutional because the State's appeal invoked the automatic stay, Fla. R. App. P. 9.310(b)(2), which the lower court declined to lift.

McKesson respectfully urges the Court to determine that McKesson is entitled, under both federal constitutional law and state law, to receive a refund of the difference between what McKesson paid in taxes and what McKesson would have paid if its products had received the same treatment as the favored products. McKesson requests that the Court thereupon remand the case to the lower court to receive evidence to determine the amount of an appropriate refund.

Alternatively, McKesson respectfully requests that the Court remand this case to the lower court with instructions to

hear evidence on the issue of McKesson's competitive injury, including evidence on the effect of the discriminatory burden on McKesson's business in Florida, and then to weigh the particular equities and determine the measure of any relief.

DATED: March 3, 1988.

Respectfully submitted,
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APPENDIX E

SUPREME COURT OF FLORIDA
Monday, May 2, 1988

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, etc., et al.,	*	
	*	
Appellants/Cross-Appellees,	*	CASE NO. 70,368
	*	
v.	*	
McKESSON CORPORATION, et al.,	*	Circuit Court Nos. 86-2997, (Leon) 86-3430 & 86-773
	*	
Appellees/Cross Appellants.	*	District Court of Appeal, 1st District - Nos. BS-402, BS-304 & BS-404
	*	
*****	*	

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for McKesson Corporation, the Motion for Rehearing filed by attorneys for Tampa Crown Distributors, Inc., and the Motion for Rehearing filed by attorneys for attorneys for Jacquín-Florida Distilling co., Inc. and Todhunter International, Inc., and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied, and it is further

ORDERED that the Motion for Stay of the Mandate Should the Pending Motion for Rehearing be Denied filed by attorneys for Jacquín-Florida Distilling and Todhunter International is hereby denied.

[SEAL]

cc: Hon. Raymond E. Rhodes, Clerk
Hon. Charles E. Miner, Jr., Judge
Hon. Paul F. hartsfield, Clerk

David G. Robertson, Esquire
Neal S. Berinhout, Esquire
Chris W. Altenbernd, Esquire
Charles A. Wachter, Esquire
M. Stephen Turner, Esquire
Daniel C. Brown, Esquire
Harold F.X. Purnell, Esquire
Barry R. Davidson, Esquire
Jack M. Coe, Esquire
Bruce S. Rogow, Esquire
Howell L. Ferguson, Esquire
Joseph Klock, Esquire
John K. Aurell, Esquire

APPENDIX F

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Leon County, Florida

WHEREAS, in that certain cause filed in this Court styled:

DIVISION OF ALCOHOLIC BEVERAGES AND
TOBACCO, etc., et al.

-vs-

McKESSON CORPORATION, et al.

Case No. 70,368

Your Case No. 86-2997, 86-3430, 86-773

The attached opinion was rendered on February 18, 1988,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

*WITNESS the Honorable Parker Lee McDonald
Chief Justice of the Supreme Court of Florida and the Seal of said
Court at Tallahassee, the Capital,
on this 2nd day of May 1988*

[SEAL]

APPENDIX G

CHAPTER 564
WINE

564.06 Excise taxes on wines and beverages; exemptions.

**564.06 Excise taxes on wines and beverages;
exemptions.-**

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of \$2.25 per gallon.

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, manufactured in Florida from Florida-grown fresh fruits, berries, or grapes and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in Florida and bottled in Florida, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight manufactured and bottled in Florida from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of \$3 per gallon, except that this tax shall not be required to be paid upon all wines manufactured in Florida from fresh fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state, bottled within this state, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines manufactured in Florida from fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state and bottled within this state.

(5) As to all beverages taxed under this section which are manufactured or bottled in Florida, there shall be a 2-percent discount allowed to the manufacturer or bottler on the amount of taxes assessed against wine for his losses from shrinkage, in filtering, breakage, and waste in bottling, the 2 percent to be computed on the taxable amount assessed by the state when sold taxpaid; and the 2 percent shall be deducted by the manufacturer or bottler on his monthly report.

(6) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(7) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted with the tax is delinquent at the time of payment.

(8) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(9) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

CHAPTER 565
LIQUOR

565.12 Excise tax on liquors and beverages.—

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$6.50 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.15 per gallon.

(2)(a) As to beverages containing more than 48 percent alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$9.53 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu

thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.75 per gallon.

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

APPENDIX H

BEVERAGE LAW: ADMINISTRATION

564.06 Excise taxes on wines and beverages; exemption.-

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of \$2.25 per gallon

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits, varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates thereof, except for flavoring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by

manufacturers and distributors a tax at the rate of \$3 per gallon except that this tax shall not be required to be paid upon all wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$3.50 per gallon except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts.

(5) Wine used by an established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(8) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not be construed as an "economic incentive or advantage" within the meaning of this subsection.

(10)(a) For the months of July and August each year the tax rate for the products specific in subsection (2), except for wine coolers which are defined below in paragraph (b), shall be \$2.25 per gallon. Otherwise, the tax rate for these products, except wine coolers, will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of the products specified in subsection (2).

Total gallons sold in
the month prior to the
time of calculation

The new per gallon tax
rate for all gallons sold
in the month following
the time of calculation

0 - 10,000.....	0.00
10,001 - 20,000	0.35
20,001 - 30,000	0.55
30,000 - 40,000	0.75
40,001 - 50,000	0.95
50,001 - 60,000	1.15
60,001 - 70,000	1.25
70,001 - 80,000	1.45
80,001 - 90,000	1.65
90,001 - 100,000	1.85
100,001 - 110,000.....	2.05
Above 110,000.....	2.25

(b) For the months of July and August 1985, 40 cents per gallon will be the tax for wine coolers; a combination of wine, as described in subsection (2); carbonated water; and flavors of fruit juices and preservatives containing 1 to 6 percent alcohol content by volume. Thereafter, the tax rate for wine coolers will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of wine coolers.

2. The total of sales referred to in subparagraph 1, of this paragraphs shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of March, April, May, June, July, and August	The new per gallon tax rate for all gallons sold in the month following the time of calculation
--	---

0 - 250,000.....	0.40
250,001 - 275,000	0.65
275,001 - 300,000.....	0.90
300,001 - 325,000.....	1.15
325,001 - 350,000.....	1.40
350,001 - 375,000.....	1.65
375,001 - 400,000.....	1.90
Above 400,000.....	2.25

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of September, October, November, December, January, and February

The new per gallon tax rate for all gallons sold in the month following the time of calculation

0 - 100,000.....	0.40
100,001 - 125,000	0.65
125,001 - 150,000.....	0.90
150,001 - 175,000.....	1.15
175,001 - 200,000.....	1.40
200,001 - 225,000.....	1.65
225,001 - 250,000.....	1.90
250,001 - 275,000.....	2.15
Above 275,000.....	2.25

(c) For the months of July and August each year, the tax rate for products specified in subsection (3) shall be \$3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph, shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in
the month prior to the
time of calculation

The new per gallon tax
rate for all gallons sold
in the month following
the time of calculation

0 - 12,500.....	1.50
Above 12,500	3.00

(c) For the months of July and August each year, the tax rate for products specified in subsection (4) shall be \$3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in
the month prior to the
time of calculation

The new per gallon tax
rate for all gallons sold
in the month following
the time of calculation

0 - 2,000.....	1.50
20,001 - 4,000	2.00
4,001 - 6,000.....	2.50
6,001 - 8,000.....	3.00
Above 8,000.....	3.50

(e) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month based on preceding paragraphs (10)(a), (b), (c), and (d).

(11) Any new applicant for the tax exemptions provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d), shall apply for those rates between July 1 and July 31 of each year, and shall pay an annual nonrefundable application fee of \$3,000. The division shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(12) Each manufacturer authorized to do business under the tax exemption provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d), shall pay an annual license fee of \$1,000 plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax exemptions or rates set forth in subsection (2), subsection (3), or subsection (4), or paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d).

(13) All revenue collected pursuant to subsections (11) and (12) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

565.12 Excise tax on liquors and beverages.--

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(5) For the months of July and August every year the tax rate for products specified in paragraph 9(1)(b) will be \$6.50 per gallon and the tax rate for the products specified in (2)(b) will be \$9.53 per gallon. Thereafter the tax rate for the products in paragraph (1)(b) and in paragraph (2)(b) will be determined in paragraph (6).

(6) By the 20th of each month (hereinafter, the time of calculation) commencing August 20, 1985, the Department of Business Regulation shall determine the increase or decrease in the sale of alcoholic beverage gallonage taxed at the rates provided in paragraph (1)(b) or paragraph (2)(b) for the prior month in comparison to that month of the year before. If that gallonage has increased, the percentage amount of said increase in excess of 5 percent shall be the percentage increase in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following the "time of calculation." If the gallonage has decreased, the percentage amount of said decrease in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following "the time of calculation." However, the tax rate provided in paragraph (1)(b) shall not decrease below

\$4.35 per gallon or increase above \$6.50 per gallon, and the tax rate provided in paragraph (2)(b) shall not decrease below \$4.95 per gallon or increase above \$9.53 per gallon.

(7) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month based on subsection (6).

(8) All revenue collected pursuant to subsections (9) and (10) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

(9) Any manufacturer or importer applying for the tax rate provided in paragraph (1)(b) or paragraph (2)(b) shall apply for that rate between July 1 and July 31 of each year and shall pay a nonrefundable application fee of \$5,000. The department shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(10) Each manufacturer authorized to do business under the tax rates imposed under paragraph (1)(b) or paragraph (2)(b) shall pay an annual license fee of \$3,000, plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax rates provided in paragraphs (1)(b) and (2)(b).

APPENDIX I

FLORIDA SENATE BILL S.B. 1326
(Enrolled as Chapter 88-308 on July 7, 1988)

* * * *

Section 9. Effective July 1, 1988, the Legislature finds and determines that the authorized transportation and importation into the state of alcoholic beverages described in chapters 564 and 565, Florida Statutes, require strict enforcement of state statutes regulating and administering the manufacture, distribution and sale of alcoholic beverages; the costs of regulating and administering such imported alcoholic beverages are greater than for those alcoholic beverages not imported; the production of lower quality alcoholic beverages should be discouraged; and in order to protect the health, safety, welfare and economic integrity of the state, the costs of ensuring compliance with relevant state laws should be included in the taxes imposed upon said alcoholic beverages.

Section 10. (1) Effective July 1, 1988, section 564.06, Florida Statutes, is amended to read:

564.06 Excise and import taxes on wines and beverages.—

(1)(a) As to beverages including wines, except natural sparkling wines and malt beverages, containing 0.5 percent or more alcohol by volume and less than 17.259 percent alcohol by volume, there shall be paid by all manufacturers and distributors a tax at the rate of \$.25 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of all beverages including wines, except natural sparkling wines and malt beverages, containing 9.5 percent or more alcohol by volume and less than 17.259 percent alcohol by volume, an import tax in the amount of \$2.00 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(2)(a) As to all wines, except natural sparkling wines, containing 17.259 percent or more alcohol by volume, there shall be paid by manufacturers and distributors a tax at the rate of \$.50 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of all wines, except natural sparkling wines, containing 17.259 percent or more alcohol by volume, an import tax in the amount of \$2.50 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(3)(a) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$1.50 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of natural sparkling wines an import tax in the amount of \$2.00 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(4)(a) As to wine coolers, which are a combination of wines containing 0.5 percent or more alcohol by volume, carbonated water, and flavors or fruit juices and preservatives and which contain 1 to 6 percent alcohol content by volume, there shall be paid by all manufacturers and distributors a tax at the rate of \$.75 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of wine coolers as described in paragraph (a) an import tax in the amount of \$1.50 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(5) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) All beverages taxed under paragraphs (1)(a), (2)(a), (3)(a), or (4)(a) and manufactured within this state for sale in this state, if fortified, shall be fortified with alcohol, except for flavoring extracts, distilled above 185 proof from produce of agricultural land inspected by Florida agricultural inspectors. All wines taxed under paragraphs (1)(a), (2)(a), (3)(a) or (4)(a) and manufactured within this state for sale in the state shall be made of produce from land inspected by Florida agricultural inspectors.

(8) The excise and import taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The department is authorized to promulgate rules to effectuate the provisions of this section.

(2) It is the legislative intent that if any amendatory provision of this section is held invalid by an interlocutory decree, while in effect, or final decree or order of a court of competent jurisdiction, the provisions of s. 564.06, Florida Statutes, as it existed on the day prior to the effective date of this section, shall then be revived and

shall be the law of this state, except as to such provisions of s. 564.06, Florida Statutes, which have heretofore been held unconstitutional by the Florida Supreme Court, and except that any amendments to such section enacted other than by this section shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of said section which expire pursuant to the provisions of this section.

Section 11. (1) Effective July 1, 1988, section 565.12, Florida Statutes, is amended to read:

565.12 Excise and import tax on liquors and beverages.—

(1)(a) As to beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, except wines, there shall be paid by every manufacturer and distributor a tax at the rate of \$4.75 per gallon. As to beverages containing less than 17.259 percent of alcohol by volume, there shall be paid by every manufacturer and distributor a tax at the rate provided in chapter 564.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, an import tax in the amount of \$1.75 per gallon to be paid by every manufacturer and distributor.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to

ensure that these taxes will only be collected once in accordance with s. 561.50.

(2)(a) As to beverages containing more than 55.780 percent of alcohol by volume, there shall be paid by every manufacturer and distributor a tax at the rate of \$5.95 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of beverages containing more than 55.780 percent of alcohol by volume, an import tax in the amount of \$3.58 per gallon to be paid by every manufacturer and distributor.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(3) The excise and import taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(4) All beverages distilled in this state for sale in this state shall be distilled above 185 proof, except for flavoring extracts, of produce from land inspected by Florida agricultural inspectors.

(5) The department is authorized to promulgate rules to effectuate the provisions of this section.

(2) It is the legislative intent that if any amendatory provision of this section is held invalid by an interlocutory decree, while in effect, or final decree or order of a court of competent jurisdiction, the provisions of s. 565.12, Florida Statutes, as it existed on the day prior to the effective date of this section, shall then be revived and shall be the law of this state, except as to such provisions of s. 565.12, Florida Statutes, which have heretofore been held unconstitutional by the Florida Supreme Court, and except that any amendments to such section enacted other than by this section shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of said section which expire pursuant to the provisions of this section.

Section 12. In the event that a court of competent jurisdiction determines any of the provisions of s. 564.06 or s. 565.12 as amended by this act to be unconstitutional, it is the intent of the legislature that the amendments to s. 564.06 and s. 565.12 contained in this act shall be null and void and that those sections revert to the language existing in said sections on June 30, 1988.

* * * *

No. 88-192

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO,
DEPARTMENT OF BUSINESS REGULATION,
and OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,
Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
JOSEPH C. MELLICHAMP, III
Chief, Tax Section
Counsel of Record
and

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QUESTIONS PRESENTED

1. Does the Commerce Clause, U.S. Const., art. I, §8, cl. 3, unaided by any Congressional act, operate to waive the sovereign immunity of the State against a suit for damages allegedly flowing from a legislative act where, under adequate and independent state law, the Petitioner is not entitled to a refund of taxes paid?

2. Is that question, if substantial, properly presented in this case?

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No. 88-192

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO,
DEPARTMENT OF BUSINESS REGULATION,
and OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,
Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondents Accept Petitioner's statement.

JURISDICTION

Respondents accept Petitioner's statement. However, Respondents assert that the question of Petitioner's entitlement, as a taxpayer, to a refund of the taxes at issue is settled by state law independent of the federal question which Petitioner seeks to pose. Further, Respondents assert that Petitioner's recasting of its tax refund claim as one for damages in recompense for alleged competitive injury flowing from the Florida Legislature's enactment of §§564.06 and 565.12, Fla. Stat. (1985), presents an insubstantial federal question.

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

Respondents accept Petitioner's statement. Because of Petitioner's framing of the issue, §768.28, Fla. Stat. (1985), Florida's general sovereign immunity waiver, is also involved. That section is reprinted as Appendix A. Sections 215.26, 561.50, 564.06(6) and 565.13, Fla. Stat. (1985), are also involved. They bear upon the treatment of beverage excise taxes under Florida law and the conditions for tax refunds. Those sections of the Florida Statutes are reprinted as Appendix B.

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case with the following exceptions and additions.

Respondents did not concede below and do not concede here that statements by, or

motivations of, individual legislators are relevant, admissible or probative. However, in answer to Petitioner's implication at page 2 of its Petition that the 1985 amendments to §§564.06 and 565.12, Fla. Stat., were enacted with protectionist intent by the Florida Legislature as a whole, Respondents note that the record presents conflicting inferences on that score. For instance, the Chairman of the Senate Finance and Taxation Committee in his comments during committee hearings indicated his desire to modify Florida's then-existing alcoholic beverage tax to meet the constitutional principles enunciated in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). His comments are reprinted as Appendix C, p. 36a. Despite the comments of some individual legislators, the indication is that the

Florida Legislature, as a body, believed that the 1985 amendments would expand the availability of Florida's tax preference to non-Florida manufacturers of alcoholic beverages, when one examines the structure of the law itself. The 1985 amendments contain elaborate sliding scale tax rates designed to place a floor under the erosion of the tax base which would be occasioned by the unchecked growth of manufacturers selling tax-preferred alcoholic beverages in Florida. A comparison of §§564.06 and 565.12, Fla. Stat. (1985) with their previous counterparts, §§564.06 and 565.12, Fla. Stat. (1984 Supp.), reveals no such capping formula in the 1984 version of the statutes. See, Appendix D, p. 38a, E, p. 47a.

The inescapable reason for the presence of the sliding scale tax structure in the 1985 statutes, and for its absence in the

previous statutory versions, was a legislative perception that the 1985 statutes would expand the availability of Florida's tax preference to manufacturers outside of Florida which had not previously received tax preferences in Florida. The trial court, after hearing the evidence, resolved those conflicting inferences by finding:

These [1985] amendments were an effort by the legislature to overcome the constitutional problems in the Florida Alcoholic Beverages laws resulting from the Bacchus decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violation addressed in Bacchus.

Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So.2d 1000, 1002 (Fla. 1988) (bracketed material added). The case evinces no finding by the trial court of protectionist motive, as opposed

to a good faith effort, though unavailing, to modify Florida's public policy in response to Bacchus.

In regard to McKesson's tax refund claim, it is the law of Florida that the general refund statute, §215.26, Fla. Stat. (1985), under which McKesson purported to seek a refund, allows for a tax refund only when the applicant bears the financial burden of an excise tax, as contrasted to the formal legal incidence of the tax. State, ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973) (hereinafter referred to as "Szabo.") McKesson never denied below that it in fact passed the cost of the tax on to its customers. Rather, McKesson asserts that it suffered injury in its market share and attendant profits because of the challenged statutes. See Appellee and Cross-Appellant McKesson Corporation's Motion for Rehearing

before the Florida Supreme Court, reprinted as Appendix F, at p. 70a.

The record below demonstrates that of \$100,000,000 in sales during 1985 in its Miami, Florida district, McKesson collected all but \$60,000 in receivables from such sales, due to the compulsions of Florida law upon retail alcoholic beverage vendors. Deposition of Stan F. Starzyk, p. 79, line 18 - p. 83, line 4, reprinted as Appendix G, p. 82a. See §561.42, Fla. Stat. (1985). Although McKesson refused to answer the State's discovery requests aimed at conclusive proof that McKesson was reimbursed for the beverage excise tax by its customers on units sold, Mr. Starzyk's testimony, together with the structure of Florida's beverage tax laws, provided sufficient evidence to support the conclusion of the Florida Supreme Court that the cost of the tax had likely been

passed on to McKesson's customers. See
Division of Alcoholic Beverages and Tobacco
v. McKesson Corporation, supra, at 1010.

McKesson's implication that the Florida Legislature enacted the 1988 beverage tax structure to reinstate the former provisions after the Florida Supreme Court struck the tax preference provisions from the 1985 statutes receives no support in the record. In fact, Ch. 88-308, Laws of Florida, to which McKesson refers at page 5 of its Petition, is closely patterned after Georgia's beverage tax law, recently upheld by the Supreme Court of Georgia as being an exercise of core Twenty-first Amendment powers and thus not in violation of the Commerce Clause. Heublein, Inc. v. State, 351 S.E.2d 190 (Ga. 1987), appeal dismissed, 107 S.Ct. 3253 (1987).

REASONS FOR DENYING THE WRIT

I.

THE NOTION THAT THE DORMANT COMMERCE CLAUSE, OF ITS OWN FORCE, OPERATES TO WAIVE THE SOVEREIGN IMMUNITY OF FLORIDA FROM SUITS SEEKING DAMAGES DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This suit was brought by McKesson directly against agencies of the executive branch of state government. §§20.16(2)(a), 20.12(1), Fla. Stat. (1985). McKesson purported below to bring this action as a taxpayer refund suit. (McKesson also sought declaratory and injunctive relief.) The law in Florida as to entitlement to refunds of excise taxes under §215.26, Fla. Stat., (1985), is that one may not obtain such a refund without showing that he bore the financial burden

of the tax. Szabo, supra. Accord, Shannon v. Hughes & Co., 270 Ky. 50, 109 S.W.2d 1174 (1937).¹

McKesson never denied below that it passed the financial burden of Florida's

¹ Scrutiny of McKesson's statement at page 5, note 2, of its Petition shows that McKesson's alleged right, as a taxpayer, to a tax refund is controlled by state law. McKesson complains that the Florida Supreme Court "reinterpreted" its earlier decisions. The cases cited by McKesson--City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972); Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d 993 (Fla. 1976); Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982); City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984); and Colding v. Herzog, 467 So.2d 980 (Fla. 1985)--all dealt with refunds of ad valorem, not excise taxes, or with fees imposed on an end consumer, and thus are not inconsistent with Florida's rule under §215.26, Fla. Stat., as to excise taxes imposed in the middle of a distribution chain on discretely identifiable product units. There was no "reinterpretation" by the Florida Supreme Court, for those decisions co-exist with the Szabo decision. However, McKesson's focus on Florida law demonstrates its unstated concern that there is no independent federal right under the Commerce Clause to a tax refund.

beverage excise tax on to its customers. Nor does it do so before this Court. Florida law is, in fact, quite clear that licensed alcoholic beverage wholesalers, such as McKesson, are merely collection conduits for the alcoholic beverage excise tax. The tax is not due until the tenth day of the month following the month in which McKesson sells beverages at wholesale. §561.50(1), Fla. Stat. (1985). Yet, McKesson's customers are required to remit payment to McKesson no later than ten days after receiving beverages from McKesson. §561.42(1),(2), Fla. Stat. (1985). McKesson therefore has up to a forty-day float period between the time it receives payment from its customers and the time that the tax remittance to Florida for such beverages is due.

Recognizing that the wholesale distributors are in fact mere collection

conduits for the tax, §§564.06(6) and 565.13, Fla. Stat. (1985), allow collection credits to McKesson quite similar to those provided under Florida's general sales tax statute. Compare §§564.06(6), 565.13, Fla. Stat. (1985) with §212.12, Fla. Stat. (1985). See also, §561.506, Fla. Stat. (1985) (wholesaler deductions from tax collection payments). Under Florida's regulations a price offered to one of McKesson's customers must be offered equally to all. Fla. Admin. Code Rule 7A-4.0471 (Appendix H, p. 88a). The amount of the tax is large in relation to the unit price of the product (e.g., \$9.53 per gallon on distilled spirits of more than 48% alcoholic content during the period in question). Thus, economic necessity virtually compelled a pass-through of the financial burden of the tax. Accordingly, the Florida Supreme Court applied Florida's

law as to taxpayer refund actions and concluded that McKesson was not entitled as a taxpayer to a refund, since granting it would create a windfall to McKesson. See also National Distributing Co. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988).²

McKesson asserts, instead, that it is entitled to a tax refund not for taxes it

² Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d. 707 (1977) and Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) are, as McKesson concedes, antitrust cases. They were cases where the gravamen of complaint was damage to business markets, made specifically actionable by the terms of the Anti-trust Laws. Those cases did not involve the sovereign immunity of a state from suit for alleged injury to business interests. They have no bearing here. This case below was brought as a taxpayer's action for taxes paid, not a businessman's statutory action for damages. The rule in antitrust cases notwithstanding, Florida's law concerning taxpayer refund suits is that one who has passed the financial burden of an excise tax on to his customers in the distribution chain is not entitled to a refund.

paid, but rather as compensation for competitive injury--loss of sales and market share--allegedly caused by Florida's statutory enactments. See Petition for Writ of Certiorari, pp. 4, 5, 14; Appellee and Cross-Appellant McKesson Corporation's Motion for Rehearing in Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, supra, reprinted as Appendix F, p. 70a.

At bottom, McKesson asserts nothing more than a right to a damage award as compensation for an alleged "constitutional tort," the legislative enactment of §§564.06 and 565.12, Fla. Stat. (1985). McKesson's assertion runs afoul of the sovereign immunity of Florida. Florida has enacted a limited sovereign immunity waiver, §768.28, Fla. Stat. (1985). Florida, however, has not waived its immunity from suits for damages where the

gravamen of the complaint is injury allegedly flowing from a basic act of governance, such as the passage of legislation. Trianon Park Condominium Ass'n. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). See also, Gamble v. Florida Dep't. of Health & Rehabilitative Services, 779 F.2d 1509, 1515 (11th Cir. 1986) (Section 768.28, Florida Statutes, intended to waive sovereign immunity for traditional torts under state law but not for "constitutional torts"); Hill v. Department of Corrections, 513 So.2d 129, 131 (Fla. 1987), cert. denied, 108 S.Ct. 1024 (1988). The result does not change simply because McKesson artfully attempts to disguise its claim for damages as one for a tax refund. Shannon v. Hughes & Co., 270 Ky. 530, 109 S.W.2d 1174 (1937).

Since Florida has not waived the "fundamental rule of sovereign immunity

which bars suit against a state without consent given," Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984), McKesson attempts to persuade the Court that the dormant Commerce Clause, of its own force and without the aid of any Congressional enactment on the subject, not only permits, but requires, a waiver of the State's sovereign immunity from suits for damages payable from the State's treasury.

McKesson's Petition presents an insubstantial argument on this point. Although the Court has many times said that the Commerce Clause, in its dormancy, acts as a restriction on the States' powers, it has never suggested that the Clause operates as a waiver ex proprio vigore of

the States' fundamental immunity from damage suits.³ In fact, this Court held in Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct., 347, 89 L.Ed. 389 (1945), that a suit in federal court for refund of taxes, founded on a Commerce Clause challenge, was barred by the Eleventh Amendment. Since the dormant Commerce Clause does not waive the States' Eleventh Amendment immunity, it cannot operate to waive the fundamental rule of

³ For instance, in Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the Court in a similar context noted that Congressional action to enforce the Fourteenth Amendment to the Constitution of the United States could remove the States' Eleventh Amendment immunity from damage suits, a result which would be "constitutionally impermissible in other contexts." Id., 96 S.Ct., at 2671. MR. JUSTICE STEVENS suggested that the Commerce Clause also supplied such Congressional authority, but did not suggest that the Commerce Clause itself, without Congressional enforcement legislation, could be said to create such a waiver.

the States' sovereign immunity, of which the Eleventh Amendment is but an exemplification. - See Pennhurst State School & Hospital v. Halderman, supra, 104 S.Ct., at 907. That is particularly true in light of the Court's scrupulous insistence that the abrogation of the Eleventh Amendment's immunity must be clearly and unequivocally expressed by Congress. E.g., Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979).

Nothing in the reasoning and holding of Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349; 30 L.Ed.2d 296 (1971), suggests that Chevron intended to lay down a constitutionally mandated rule on the retroactive application of judicial decisions. It should not be so expanded on the facts of this case, facts which directly implicate the sovereign immunity of the States and which would call upon the

Court to necessarily find within the dormant Commerce Clause a waiver of the States' traditional immunity from damage suits.

McKesson's extension of the dormant Commerce Clause is not only undercut by precedent; it rests upon an incorrect premise: that no other remedy is effective. That premise is demonstrably wrong. Temporary restraining orders which have the effect of permitting an aggrieved taxpayer to escrow challenged taxes pending outcome of suit are enforceable by this Court when necessary to protect federal constitutional interests. American Trucking Ass'n, Inc. v. Gray, 108 S.Ct. 2 (1987). Moreover, the Florida courts have approved procedures allowing aggrieved taxpayers to escrow or to self-accrue challenged taxes during the pendency of litigation over their constitutionality,

thus avoiding the questions of sovereign immunity which attend tax refund actions. Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984). Temporary injunctive relief is an available taxpayer remedy under Florida law in suits challenging the validity of a tax. See Lee v. Bond-Howell Lumber Co., 123 Fla. 202, 166 So. 733 (1936). See, generally, Overstreet v. Ty-Tan, Inc., 48 So.2d 158 (Fla. 1950); Atlantic Nat. Bank of Jacksonville v. Simpson, 136 Fla. 809, 188 So. 636 (1938). The withholding of taxes pending the outcome of suit is most certainly as effective a tool as the refunding of them.⁴

⁴ For that reason, if for no other, the cases relied upon by McKesson as supporting its claim of a federally-guaranteed "refund-as-damages" remedy are not on point. For instance, in Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1912), the court noted the unavailability of

II.

THE POSTURE OF THIS CASE IS ILL-SUITED TO RESOLVE THE ISSUE PRESENTED.

The Court should decline, on the face of it, McKesson's invitation to cut from whole cloth a waiver of the States' immunity based upon the dormant Commerce Clause. The balance of state and federal interests in the matter is at the same time so delicate and so broad in repercussion that, under the best of circumstances, the endeavor is uniquely ill-suited to case-by-case adjudication. There is prudence in the Court's historical reluctance to undertake such a task, particularly since

injunctive relief under state law to interfere with tax collection. See also Iowa-Des Moines State Bank v. Bennett, 284 U.S. 239 52 S.Ct. 133, 76 L.Ed 265 (1931). Moreover, no issue of a state's sovereign immunity was raised or decided in those cases.

the entire issue is within the sphere of Congressional power to resolve. See Parden v. Terminal R. of Alabama Docks Dep't., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

Moreover, the record in this case does not lend itself to a clear exposition of the issues in an area where clarity is certainly essential. This is not a case where state law forbade McKesson any pre-payment challenge to the taxes in question. Rather, Florida's procedural law countenances temporary injunctive relief in taxpayer actions. See, e.g., Lee v. Bond-Howell Lumber Co., supra. This is not a case in which McKesson sought temporary relief before paying the tax and was denied such relief. Rather, McKesson waited until the statutes had been in effect for fifteen months before bringing suit. This is not a case in which the state courts denied

McKesson a plain, speedy and efficient remedy. Instead, the Florida courts accorded expedited hearings to McKesson at all stages of the proceedings below.

McKesson did not timely pursue an effective remedy available to it. This case is therefore a poor vehicle upon which to delineate the circumstances in which relief in the form of damages might be a remedy, assuming in the first instance that the question of a Commerce Clause guarantee of such a remedy under any circumstances is at all substantial.

CONCLUSION

McKesson's asserted right to a refund of taxes paid under §§564.06 and 565.12, Fla. Stat. (1985), is governed by state law independent of the federal question which McKesson seeks to present. There is competent substantial evidence to support

the finding of the Florida Supreme Court that McKesson passed the tax burden on to its customers. Therefore, under Florida's tax refund statute, McKesson is not entitled to a refund as a taxpayer. McKesson's claim that it is entitled to a refund, not to recoup the value of taxes which it paid, but as compensation for alleged business injury under the dormant Commerce Clause presents an insubstantial federal question. That claim is barred by Florida's sovereign immunity. Even were that claim substantial, this case does not present a record on which the parameters of such a novel issue can be defined with the clarity needed to guide the States in such a sensitive area. The Court has spoken on this subject before. This case presents no occasion to revisit existing precedent.

Respondents urge the Court to decline review.

Dated: September ___, 1988

Respectfully submitted,

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APPENDIX A

**§768.28(1), (2), (5), Florida Statutes
(1985)**

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person,

would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

* * * * *

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act upto \$100,000 or

\$200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

APPENDIX B

Portions of Chapters 215, 561, 564 and 565, Florida Statutes

Section 215.26(1), Fla. Stat. (1985):

The Comptroller of the state may refund to the person who paid same, or his heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute:

- (a) An overpayment of any tax, license, or account due;
- (b) A payment where no tax, license, or account is due; and
- (c) Any payment made into the State Treasury in error;

and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective

funds from time to time such sums as may be necessary for such refunds.

Section 561.50(1), Fla. Stat. (1985):

There shall be only one state tax paid as to each gallon or fraction thereof of beverage sold under the Beverage Law, and no other excise tax shall be levied directly or indirectly. Such tax shall be computed from the reports, books, and records of manufacturers and distributors; and the amount so computed shall be remitted with the report required by s.561.55 to the division at intervals of 1 month, on or before the 10th of each month, for all beverages sold during the previous calendar month, and such payment of tax shall accompany the report required by s.561.55. If the monthly tax liability of a manufacturer or distributor exceeds the amount of the bond furnished for payment of

taxes, the division, upon a finding based upon substantial and competent evidence that the security of the tax revenue involved is in jeopardy, may require a bond equal to the anticipated tax liability of the manufacturer or distributor. Additionally, the division may increase the frequency of the remittance of the tax when the security of the tax involved is in immediate jeopardy or the financial condition of the manufacturer or distributor is unstable and the potential tax liability exceeds the bond furnished under the Beverage Law. In arriving at a conclusion that the security of the tax revenue involved is in jeopardy, the division shall consider and be guided by prior history, if any, of the compliance or noncompliance by the manufacturer or distributor with beverage tax obligations; the transient or nontransient nature of the

manufacturer or distributorship; the type of inventory, the equity of the manufacturer or distributor therein, and the mobility of such inventory; the financial status of the manufacturer or distributor; and the anticipated tax obligation of the manufacturer or distributor.

Section 561.506, Fla. Stat. (1985):

(1) For 11 months beginning with the tax collection payment due the division on August 10, 1969, each wholesaler shall remit the tax due, plus a repayment in the amount of 16.4 percent of the tax due to the division. Up to 10 percent of the total payment may be made in the form of revenue stamps previously purchased.

(2) Beginning August 10, 1971, each wholesaler may deduct from his monthly tax collection payment an amount not to exceed

2 percent of the prepaid amount to his credit as of June 11, 1970, which amount shall include any unamortized stamps.

Section 564.06(6), Fla. Stat. (1985):

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

565.13, Fla. Stat. (1985):

Every distributor selling spiritous beverages within the state shall pay the tax to the division monthly on or before

the 10th day of the following month, less 1.0 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance may be granted or permitted when the tax is delinquent at the time of payment.

APPENDIX C

Excerpt of Comments by the Chairman of the Committee on Finance and Taxation, Florida Senate, During Committee Hearings on Senate Bill 425 on May 14, 1985

Chairman:

Senator, to respond to your question, as you remember in the Commerce Committee, the extent of discussion about that and Senator Grant had a different opinion about this, but I thought we got him satisfied back then, but there's a basic distinction in the type of taxation, type of production and currently the reason the exemption for gasohol is currently in effect. What's I'm trying to do is keep the exemption for distilleries in effect. And what has happened in the Supreme Court in the Bacchus case is that has made a ruling that would tend to jeopardize our existing language, which has been on the books,

because of the technical aspects of the Bacchus decision. What this attempts to do would be to redraw it, the same basic dollar amount, the same concept, but make it so that it's constitutional. So this question on this issue we have a constitutional problem which we are dealing with and the other question is simply a policy matter.

APPENDIX D

Sections 564.06 and 565.12,
Fla. Stat. (1984 Supp.)

564.06 Excise taxes on wines and beverages; exemptions.-

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of \$2.25 per gallon.

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, manufactured in Florida from Florida-grown fresh fruits, berries, or grapes and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and

concentrated in Florida and bottled in Florida, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight manufactured and bottled in Florida from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of \$3 per gallon, except that this tax shall not be required to be paid upon

all wines manufactured in Florida from fresh fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state, bottled within this state, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines manufactured in Florida from fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state and bottled within this state.

(5) As to all beverages taxed under this section which are manufactured or bottled in Florida, there shall be a 2-percent discount allowed to the manufacturer or bottler on the amount of taxes assessed against wine for his losses from shrinkage, in filtering, breakage, and waste in bottling, the 2 percent to be computed on the taxable amount assessed by the state when sold taxpaid; and the 2 percent shall be deducted by the manufacturer or bottler on his monthly report.

(6) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(7) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(8) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(9) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a

post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

565.12 Excise tax on liquors and beverages.-

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$6.50 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and

mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.15 per gallon.

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$9.53 per gallon.

(b) As to beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except

concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof shall be paid by every manufacturer and distributor a tax at the rate of \$4.75 per gallon.

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

APPENDIX E

Sections 564.06 and 565.12, Fla. Stat. (1985)

564.06 Excise taxes on wines and beverages; exemption.-

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight, and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of \$2.25 per gallon

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits or varieties of the species Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis

ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana or Vitis berlandieri, or from concentrates thereof, except for flavoring extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits, varieties of the species Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana or Vitis berlandieri, citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates thereof, except for flavoring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid

by manufacturers and distributors a tax at the rate of \$3 per gallon except that this tax shall not be required to be paid upon all wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana or Vitis berlandieri, or from concentrates thereof, except for flavoring extracts, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$3.50 per gallon except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic content is manufactured exclusively from

citrus fruits or varieties of the species Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana or Vitis berlandieri, of from concentrates thereof, except for flavoring extracts.

(5) Wine used by an established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state.

However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(8) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not

be construed as an "economic incentive or advantage" within the meaning of this subsection.

(10)(a) For the months of July and August each year the tax rate for the products specified in subsection (2), except for wine coolers which are defined below in paragraph (b), shall be \$2.25 per gallon. Otherwise, the tax rate for these products, except wine coolers, will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of the products specified in subsection (2).

* * * * *

Total gallons sold
the month prior to
the time of calculation

The new per in
gallon tax rate
for all gallons
sold in the
month following
the time of
calculation

0 - 10,000.....	0.00
10,001 - 20,000.....	0.35
20,001 - 30,000.....	0.55
30,001 - 40,000.....	0.75
40,001 - 50,000.....	0.95
50,001 - 60,000.....	1.15
60,001 - 70,000.....	1.25
70,001 - 80,000.....	1.45
80,001 - 90,000.....	1.65
90,001 - 100,000.....	1.85
100,001 - 110,000.....	2.05
Above 110,000.....	2.25

(b) For the months of July and August 1985, 40 cents per gallon will be the tax for wine coolers; a combination of wine, as described in subsection (2); carbonated water; and flavors of fruit juices and preservatives containing 1 to 6 percent alcohol content by volume. Thereafter, the tax rate for wine coolers will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of wine coolers.

2. The total of sales referred to in subparagraph 1, of this paragraph shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Sales of wine coolers
in the month prior to
the time of calculation
for each month for the
6-month period of March,
April, May, June, July,
and August

The new per
gallon tax
rate for all
gallons sold
in the month
following
the time of
calculation

0 - 250,000.....	0.40
250,001 - 275,000.....	0.65
275,001 - 300,000.....	0.90
300,001 - 325,000.....	1.15
325,001 - 350,000.....	1.40

350,001 - 375,000.....	1.65
375,001 - 400,000.....	1.90
Above 400,000.....	2.25

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of September, October, November, December, January, and February

The new gallon tax rate for all gallons sold in the month following the time of calculation

0 - 100,000.....	0.40
100,001 - 125,000.....	0.65
125,001 - 150,000.....	0.90
150,000 - 175,000.....	1.15
175,000 - 200,000.....	1.40
200,001 - 225,000.....	1.65
225,001 - 250,000.....	1.90
250,001 - 275,000.....	2.15
Above 275,000.....	2.25

(c) For the months of July and August each year, the tax rate for the products specified in subsection (3) shall be \$3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department

of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph, shall determine the sole tax applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold the month prior to the time of calculation

The new per gallon tax rate for all gallons sold in the month following the time of calculation

0 - 12,500.....	1.50
Above 12,500.....	3.00

(c) For the months of July and August each year, the tax rate for the products specified in subsection (4) shall be \$3.50 per gallon. Thereafter, the tax rate for

these products will be determined as follows:

1. By the 20th of each month (hereinafter, "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in the month prior to the time of calculation

The new per gallon tax rate for all gallons sold in the month following the time of calculation

0 - 2,000.....	1.50
2,001 - 4,000.....	2.00
4,001 - 6,000.....	2.50
6,001 - 8,000.....	3.00
Above 8,000.....	3.50

(e) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month based preceding paragraphs (10) (a), (b), (c), and (d).

(11) Any new applicant for the tax exemptions provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10) (a), paragraph (10) (b), paragraph (10) (c), or paragraph (10) (d), shall apply for those rates between July 1 and July 31 of each year, and shall pay an annual nonrefundable application fee of \$3,000. The division shall adopt appropriate rules of practice and procedure to establish a

method of qualification for affected parties.

(12) Each manufacturer authorized to do business under the tax exemption provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d), shall pay an annual license fee of \$1,000 plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax exemptions of rates set forth in subsection (2), subsection (3), or subsection (4), or paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d).

(13) All revenue collected pursuant to subsections (11) and (12) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

565.12 Excise tax on liquors and beverages.-

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus

products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages

exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2) (a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus

products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide

agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(5) For the months of July and August every year the tax rate for products specified in paragraph (1)(b) will be \$6.50 per gallon and the tax rate for the products specified in (2)(b) will be \$9.53 per gallon. Thereafter the tax rate for the products in paragraph (1)(b) and in paragraph (2)(b) will be determined in paragraph (6).

(6) By the 20th of each month (hereinafter, the time of calculation) commencing August 20, 1985, the Department

of Business Regulation shall determine the increase or decrease in the sale of alcoholic beverage gallonage taxed at the rates provided in paragraph (1)(b) or paragraph (2)(b) for the prior month in comparison to that month of the year before. If that gallonage has increased, the percentage amount of said increase in excess of 5 percent shall be the percentage increase in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following the "time of calculation." If the gallonage has decreased, the percentage amount of said decrease in excess of 5 percent shall be the percentage decrease in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following "the time of calculation." However, the tax rate provided in paragraph (1)(b) shall not

decrease below \$4.35 per gallon or increase above \$6.50 per gallon, and the tax rate provided in paragraph (2)(b) shall not decrease below \$4.95 per gallon or increase above \$9.53 per gallon.

(7) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month based on subsection (6).

(8) All revenue collected pursuant to subsections (9) and (10) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

(9) Any manufacturer or importer applying for the tax rate provided in paragraph (1)(b) or paragraph (2)(b) shall

apply for that rate between July 1 and July 31 of each year and shall pay a nonrefundable application fee of \$5,000. The department shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(10) Each manufacturer authorized to do business under the tax rates imposed under paragraph (1)(b) or paragraph (2)(b) shall pay an annual license fee of \$3,000, plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax rates provided in paragraphs (1)(b) and (2)(b).

APPENDIX F

SUPREME COURT OF THE STATE OF FLORIDA

No. 70,368

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION,
AND OFFICE OF
THE COMPTROLLER, STATE OF FLORIDA,
et al.
Defendants/Appellants/Cross-Appellees,

v.

McKESSON CORPORATION, et al.
Plaintiff/Appellee/Cross-Appellant.

APPELLEE AND CROSS-APPELLANT
McKESSON CORPORATION'S
MOTION FOR REHEARING

Appellee-Cross-Appellant McKesson
Corporation ("McKesson"), by and through
its undersigned attorneys, pursuant to
Florida Rule of Appellate Procedure 9.330,
moves for rehearing. McKesson does not
wish to reargue the merits of its case but
respectfully believes that the Court has

overlooked or misapprehended certain
points of law and fact in its peremptory
denial of any relief for the constitutional
injury McKesson has sustained during the
period that Florida has collected
discriminatory taxes. McKesson submits
that the Court's decision denying relief
overlooks both federal law established in
similar cases and this Court's own
decisions.¹

¹ McKesson will not restate the federal
constitutional law arguments that it has
already made to this Court. The Court,
however, cites Lemon v. Kurtzman, 411 U.S.
192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973),
in denying McKesson relief. The United
States Supreme Court has not in this
century permitted a state to collect or
retain taxes assessed under an
unconstitutional statute. Lemon does not
hold otherwise. The Court in Lemon did not
address a taxpayer's claim for relief from
a discriminatory tax burden. Rather, the
Court allowed payment pursuant to service
contracts for services already rendered,
even though the Court earlier had declared
the contracts unconstitutional. Lemon
simply cannot be used to authorize Florida
to retain taxes that this Court has held
were unconstitutionally collected.

The Court in denying McKesson's request for an appropriate refund appears to expand the holding in Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), such that a heretofore-recognized narrow exception to the doctrine has swallowed the doctrine.² This Court consistently has provided a refund remedy to taxpayers who paid taxes under an unlawful scheme, although the Court has limited that remedy to those taxpayers who actually filed the suit challenging the validity of the tax

² See Coe v. Broward County, 358 So.2d 214, 216 (Fla. 4th DCA 1978) (recognizing Gulesian as a narrow exception to the rule that a taxpayer is entitled to a refund of taxes paid pursuant to an unlawful assessment).

scheme.³ In Gulesian, however, the Court allowed a carefully-reasoned exception.

In Gulesian, the circuit court, after "weighing equities and considering the slight benefits to individual taxpayers [affected by the invalid tax]," denied a refund of taxes collected under an unconstitutional statute. Gulesian, 281 So.2d at 326. Specifically, the circuit court found that plaintiffs and all other taxpayers had voluntarily paid the tax "without protest and not under compulsion;" that the School Board, which had levied the invalid tax, had relied in good faith on a presumptively [sic] valid state statute; and

³ See City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 7 (Fla. 1972); Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d 993, 995 (Fla. 1976); Osterndorf v. Turner, 426 So.2d 539, 541, 545 (Fla. 1982); City of Tampa v. Thatcher Glass Corp., 445 So.2d 578, 580 (Fla. 1984); Colding v. Herzog, 467 So.2d 980, 983 (Fla. 1985).

that requiring a refund "in small amounts to over 350,000 Dade County taxpayers would impose an intolerable burden on the School Board." Id. This Court agreed with the lower court's specific findings and reasoning and, therefore, affirmed.

In this case, however, the circuit court has not made specific findings regarding McKesson's claim for a refund and could not yet weigh the equities because the circuit court has not yet heard evidence on the issue. McKesson in its motions for partial summary judgment and for a preliminary injunction had not yet raised the issue of an appropriate refund. Therefore, when the circuit court decided to bar any relief for the injury McKesson has sustained during the period that Florida has collected the discriminatory taxes, it acted without first hearing evidence on the refund

issue.⁴ McKesson has not had the opportunity to present its evidence to the lower court establishing the effect of the discriminatory tax burden on McKesson's business in Florida, including the effect on McKesson's sales, market share, and profit. In sum, McKesson has never had the opportunity to demonstrate the extent of the very competitive injury that this Court recognized in striking down the unconstitutional statutes.

Unlike the 350,000 taxpayers in Gulesian who were only slightly affected by the improper assessment, McKesson, which did pay the challenged tax under protest and did pay under compulsion, has incurred a substantial injury under a discriminatory

⁴ McKesson raised the refund issue in this Court, as a cross-appellant, in response to the lower court's statement that its declaration of unconstitutionality would operate only prospectively, thereby barring any refund.

scheme. Further, the State in this case did not rely on invalid statutes but rather enacted the unconstitutional statutes.⁵

By applying Gulesian in this case to bar any remedy, without first instructing the lower court to hear evidence and weigh the particular equities in this case, the Court appears to expand the narrow holding in Gulesian to bar any refund of taxes collected under an unconstitutional statute so long as the statute was presumptively valid before it was declared unconstitutional. McKesson submits that under such a doctrine no taxpayer will ever be entitled to a refund for unconstitutional taxes.

⁵McKesson maintains that the State enacted the revised statutes to preserve the protectionism inherent in the former statutory scheme, and acted after the Florida Department of Business Regulation warned in a memorandum that the revised statutes continued the unconstitutional discriminatory effect of the old scheme.

The Court's statement that "the cost of the tax has likely been passed on to their customers" (P. 16) should not serve to bar McKesson's opportunity to present evidence on the measure of its injury. First, the circuit court has not heard evidence on this "pass-on" issue. Second, regardless of whether the cost of the discriminatory tax has been passed on to McKesson's customers, McKesson has sustained an economic injury in the competitive marketplace. In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 267, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the Supreme Court observed: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages."

Whether McKesson raised the price of its products to cover the added tax burden that the discriminatory tax scheme imposed,

thereby selling fewer products than it otherwise would have, or did not raise the price of its products to cover the added burden, thereby reducing its profit margin, McKesson has been injured.⁶

Further, this Court plainly found that McKesson has sustained a competitive injury.

It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not. . . . Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or

⁶ The alcoholic beverage excise tax is significantly different from the general sales tax, which is stated separately from an item's purchase price and for which retailers simply serve as collection agents for the state. See §212.07(1)(a) and (2), Fla. Stat. (Supp. 1987).

distributor of alcoholic beverages which are not [favored].

(P. 12-13)

The Florida alcoholic beverage tax scheme, by design, has imposed an unconstitutional burden on McKesson by raising its cost of doing business compared to distributors of the favored products. That burden continued even after the lower court declared the discrimination unconstitutional because the State's appeal invoked the automatic stay, Fla. R. App. P. 9.310(b)(2), which the lower court declined to lift.

McKesson respectfully urges the Court to determine that McKesson is entitled, under both federal constitutional law and state law, to receive a refund of the difference between what McKesson paid in taxes and what McKesson would have paid in taxes and what McKesson would have paid if

its products had received the same treatment as the favored products. McKesson requests that the Court thereupon remand the case to the lower court to receive evidence to determine the amount of an appropriate refund.

Alternatively, McKesson respectfully requests that the Court remand this case to the lower court with instructions to hear evidence on the issue of McKesson's competitive injury, including evidence on the effect of the discriminatory burden on McKesson's business in Florida, and then to weigh the particular equities and determine the measure of any relief.

DATED: March 3, 1988

Respectfully submitted,
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APPENDIX G

Deposition of Stan F. Starzyk, taken
November 6, 1986,
Page 79, Line 18 Through Page 83, Line 4

Q Mr. Starzyk, it's true under Florida law, is it not, that you can give no more than 10 days credit to a vendor to whom you sell alcoholic beverages?

A That's Florida law, I believe. I mean, there's more to it than that, but it's 10 days.

Q When a vendor fails to pay within 10 days, you report them to the Department of Business Regulation; is that not right?

A They are listed, yes.

Q What is the effect on a vendor when you do that to them?

A What is the effect on the vendor?

Q Yes.

A Well, if he doesn't pay his bills, then two things happen. One is he would have to be on COD.

Q And what does that mean?

A That means he would have to pay for his product on a cash basis, or it can go on a no-ship list.

Q What is a no-ship list?

A It means you are not legal -- it's not legal to ship this particular account.

Q And that would mean no distributor to ship to that vendor?

A I believe that's the way it is, yes.

Q And that vendor couldn't buy from any distributor unless he paid cash?

MR. ROBERTSON: I haven't been -- all these questions have been calling for legal conclusions.

I haven't been objecting. If you are asking for his --

MR. BROWN: I'm asking his understanding.

MR. ROBERTSON: What his practical understanding is?

MR. BROWN: That's what I want, his practical understanding of how it works.

MR. ROBERTSON: You can go to the statute if you want answers to these questions.

THE WITNESS: If you are listed -- let me go back.

If we do not receive payment, that customer is listed. He should not be -- if you are listed with the State of Florida, you as a wholesaler are not allowed to ship him product.

BY MR. BROWN:

Q In your experience -- first, let me ask this:

McKesson often does that with vendors who are tardy in making payments; isn't that true?

A Yes.

MR. ROBERTSON: Does what?

THE WITNESS: They list with the state.

BY MR. BROWN:

Q Put them on the list, do whatever is permitted by Florida law under 561.42?

A Right.

Q In your experience that has been a fairly effective means of collecting debts from vendors; has it not?

A It's not an effective means of collecting debts. It's a means by law that you cannot ship them product. But we have received so often from vendors -- even when we receive bad checks and we have been shipping them, but by the time we get the bad checks, we haven't collected for the

merchandise.

Q Once a vendor gets on a list and cannot receive shipments of beverages from any distributor in the state, isn't it true that in the vast majority of cases he will correct that mistake and get the distributor paid?

A Not true. We have suffered too many losses for that to be true.

Q How much did you lose in dollar losses in the fiscal year 1985 as a result of vendors not paying you for beverage product?

A I don't have the exact knowledge, but I'm going to approximate around \$60,000.

Q Out of a total --

MR. ROBERTSON: Are you talking about Miami now or --

THE WITNESS: Talking about Miami.

BY MR. BROWN:

Q \$60,000 that you never again saw,

never collected?

A Correct.

Q Out of a total sales volume of what?

A A total sales volume of 100 million dollars.

MR. BROWN: That's everything I have.

APPENDIX H

Rule 7A-4.0471, Florida Administrative Code

(Division of Alcoholic Beverages and Tobacco)

7A-4.0471 Discounts, Records, Deal Sheets.

(1) All distributors shall be required to keep as part of their accounting records a listing of all alcoholic beverage items offered for sale. These lists must reflect the prices and discounts allowed vendors on the purchase of these items. All distributors shall maintain and keep copies of their deal sheets on the licensed premises for a period of three years.

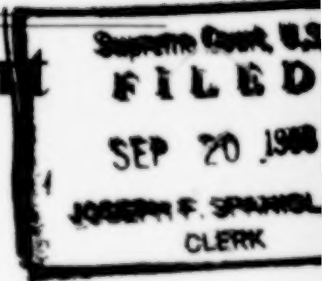
(2) To provide that the same discounts shall be offered to all vendors buying similar quantities, said deal sheets when established shall remain in effect for the remainder of day that the deal is

established. Specific Authority 561.11 FS.

Law Implemented 561.01(10), 561.42 FS.

History - New 3-1-76, Formerly 7A-4.471.

In the Supreme Court
OF THE
United States



OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

*ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA*

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

The petitioner McKesson Corporation ("McKesson") respectfully submits this reply memorandum in response to the Brief of the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida (collectively, the "State") in opposition to McKesson's petition for a writ of certiorari.¹

McKesson has asked this Court to hear this case to require Florida to properly consider the federal Constitution's limitations on the states' retention of unconstitutional taxes. In recent years, state legislatures and state courts frequently have frustrated taxpayers' attempts to retrieve unconstitutional taxes.²

The State does not respond directly to McKesson's arguments for this Court's granting the writ. Instead, the State raises a claim of sovereign immunity, asserts a challenge to McKesson's standing, and suggests that McKesson failed to seek alternative relief to a tax refund. The State's three arguments are frivolous.

¹McKesson's Rule 28.1 list has not changed and is attached as Appendix A to McKesson's petition for a writ of certiorari.

²In another petition for a writ of certiorari before this Court, *American Trucking Ass'n v. Smith*, petition for cert. filed, No. 88-325, (filed August 1988), petitioners ask the Court to review a decision of the Arkansas Supreme Court, which held that an Arkansas tax violated the Commerce Clause but nevertheless refused to order a refund of unconstitutional taxes.

**McKESSON'S CLAIM FOR A TAX REFUND
IN THIS CASE DOES NOT RAISE
ANY SOVEREIGN IMMUNITY ISSUE**

In raising the banner of sovereign immunity in this case, the State in fact has raised a red herring. While the doctrine of sovereign immunity provides that "no sovereign may be sued in its own courts without its consent," the doctrine does not, of course, apply where the sovereign has granted its consent. *Nevada v. Hall*, 440 U.S. 410, 416 (1979).

As the State well knows, Florida law has long permitted a taxpayer to challenge the validity of a tax and to seek a refund of invalid taxes. "There have been many suits in Florida to determine the validity of a tax and to direct the making of a refund by the Comptroller under F.S. Section 215.26, F.S.A." *State ex rel. Victor Chemical Works v. Gay*, 74 So. 2d 560, 564 (Fla. 1954). *See also Reynolds Fasteners, Inc. v. Wright*, 197 So. 2d 295 (Fla. 1967) (challenging Florida tax on federal constitutional grounds, and seeking refund).³

The State nevertheless presses its sovereign immunity argument on the erroneous assumption that McKesson's claim for a tax refund, pursuant to section 215.26, Florida Statutes (1985), is in reality an "artfully disguised" tort action against the State of Florida. While Florida has consented to tax refund

³The State's reference to the Eleventh Amendment discussion in *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1945), ignores that McKesson filed its suit in Florida state court, not in federal court. Indeed, the Court in *Ford Motor Co.* observed the "advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds," after which this Court could review any federal constitutional issues. *Id.* at 470.

actions it has not consented to "constitutional tort" actions. (State's Brief at 14-15)

McKesson has prosecuted this action, from its inception, as a claim for a tax refund precisely because McKesson could not pursue any other Florida action to obtain a measure of relief for the competitive injury it has sustained. The State's unsupported reasoning would transform any aggrieved taxpayer's legitimate refund action, challenging the constitutionality of a tax, into an illegitimate tort action.

The Florida Supreme Court ignored the State's sovereign immunity argument. This Court should ignore the argument as well.

II

THE FLORIDA SUPREME COURT DID NOT BASE ITS DECISION ON AN ADEQUATE AND INDEPENDENT STATE GROUND

Despite McKesson's position in this case as a victim of a discriminatory tax, the State appears to challenge McKesson's standing under Florida law to seek a tax refund. The State claims that McKesson was "merely [a] collection conduit[]" for the unconstitutional Florida tax and therefore suffered no injury.⁴ (State's Brief at 11)

⁴The State's assertion that "McKesson never denied below that it passed the financial burden of Florida's beverage excise tax on to its customers" is nonsense. (State's Brief at 10-11) A "pass-on" argument in this context is economic chicanery. McKesson has argued consistently that regardless of whether it raised its prices to cover the discriminatory tax burden, thereby losing market share to the favored competitors, or did not raise its prices to cover the discriminatory taxes, thereby reducing its profits, McKesson has sustained an economic injury.

The State cites *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So. 2d 529 (Fla. 1973), where the Florida Court found that the alleged taxpayer in that case in fact "bore no tax liability." *Id.* at 532. The Court held that "[o]ne who does not himself bear the financial burden of a wrongfully extracted tax suffers no loss or injury" and therefore does not have standing to challenge the tax collection. *Id.*

In this case, however, the Florida Supreme Court, citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), expressly found that "as [a] wholesale distributor[] . . . of alcoholic beverages who [is] liable for taxes under Florida's alcoholic beverage tax scheme, [McKesson has] standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact on [its] business[]." (Appendix B to McKesson's Petition at 5a) Further, the Florida Supreme Court found that the tax scheme "clearly raises [McKesson's] relative cost of doing business." (*Id.* at 17a) The Florida Supreme Court did not share the State's view that McKesson, as a taxpayer, has not suffered any injury.

Moreover, section 215.26, Florida Statutes (1985), establishes McKesson's standing under Florida law to seek a tax refund in this case. Section 215.26 provides that the comptroller shall pay the tax refund to the person who paid the tax. The State cannot dispute that McKesson, as a wholesale distributor of alcoholic beverages, in fact paid the unconstitutionally discriminatory excise taxes on its alcoholic beverages. Under section 215.26, and according to the Florida Supreme Court's opinion in this case, McKesson has standing to challenge the constitutionality of the Florida alcoholic beverage tax scheme and to seek a refund of taxes unconstitutionally collected.

The Florida Supreme Court never suggested in its opinion that the Court has based its rejection of McKesson's federal

constitutional arguments for a refund on independent state law grounds. The Florida Court did suggest that, although McKesson has standing, McKesson may have passed the tax on to its customers.⁵ The Florida Court refers to a "pass-on" as one of the "equitable considerations" for rejecting McKesson's argument that *both* the federal Constitution and Florida law compel a remedy for unconstitutional state taxes. (Appendix B to McKesson's Petition at 21a) The Court cites a decision of this Court, *Lemon v. Kurtzman*, 411 U.S. 192 (1973), to support its reasoning.

The Florida Court's decision certainly does not "indicate[] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). In announcing the "requirement of a 'plain statement' that a decision rests upon adequate and independent state grounds," this Court noted:

"It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."

Id. at 1041-42 (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). This Court has jurisdiction to decide this case.

⁵The Florida Court never reconciled its finding that McKesson has standing because it suffered competitive harm as a result of Florida's discriminatory tax scheme with its speculative statement that McKesson may have engaged in a "pass-on" of taxes. (Appendix B to McKesson's Petition at 21a)

McKESSON HAS PURSUED EVERY OPPORTUNITY FOR RELIEF

Finally, the State asserts that McKesson in this case "did not timely pursue an effective remedy available to it" that would have obviated McKesson's claim for a tax refund. (State's Brief at 23) The State's assertion is incomprehensible.

The State argues that McKesson should have sought a temporary injunction to avoid paying the challenged taxes during the litigation. (State's Brief at 20-22) The State cites *Lee v. Bond-Howell Lumber Co.*, 166 So. 733 (Fla. 1936), *Atlantic Nat. Bank of Jacksonville v. Simpson*, 188 So. 636 (Fla. 1938), and *Overstreet v. Ty-Tan, Inc.*, 48 So. 2d 158 (Fla. 1950), to demonstrate that Florida courts have granted injunctions in tax cases.

The State's argument that McKesson failed to seek preliminary relief does not make sense. After exhausting all administrative remedies, as Florida law requires, McKesson filed this action in Florida circuit court. One month later, McKesson filed a motion for an injunction to enjoin the State's enforcement of the discriminatory tax scheme. Six months later, after finding the tax scheme unconstitutional, the circuit court entered an order granting McKesson's motion for an injunction. However, the State's notice of appeal automatically caused a stay of the circuit court's order under the Florida Rules of Appellate Procedure.

McKesson immediately moved the court to vacate the automatic stay, arguing that continued enforcement of the unconstitutional tax scheme would further expose Florida's revenues to claims for refunds. McKesson invited the State to join in the

motion but the State declined. The court denied McKesson's motion.

In light of the continuing stay of the circuit court's injunction, pending appeal, McKesson sought immediate review in the Florida Supreme Court. Again, McKesson noted that continued enforcement of the tax scheme exposed Florida's revenues to refund claims. The Florida Supreme Court agreed to hear the case on an expedited basis.⁶

The State also asserts that McKesson could have escrowed or self-accrued the challenged taxes during the litigation. (State's Brief at 19-20) To support this proposition, the State cites *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985). In *Eastern Air Lines*, however, the State and Eastern agreed by *stipulation* that Eastern could self-accrue the challenged taxes. *Id.* at 313. No provision in Florida law granted Eastern the right to self-accrue.

In this case, when an escrow arrangement was proposed at the Florida circuit court hearing on McKesson's motion to vacate the automatic stay, Assistant Attorney General Brown,

⁶The State, citing *American Trucking Ass'n v. Gray*, 483 U.S. ___, 108 S.Ct. 2 (Blackmun, Circuit Justice 1987), also appears to suggest that McKesson should have applied to this Court for relief, before prosecuting its case in the Florida courts. (State's Brief at 19) In the *Gray* case, Justice Blackmun intervened only after this Court had already resolved the constitutional issue and only after the applicants had already exhausted their remedies, on remand, in the Arkansas courts. The State appears to suggest that McKesson should have tried to use the same extraordinary procedure even before the Florida Supreme Court had considered the case. Thus, the State's suggestion ignores the rule that "[t]he Circuit Justice's injunctive power is to be used 'sparingly and only in the most critical and exigent circumstances' . . . and only where the legal rights at issue are 'indisputably clear.'" *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, ___ U.S. ___, 107 S.Ct. 682, 683 (Scalia, Circuit Justice 1986) (citations omitted).

representing the State, responded: "On that one, Your Honor, I've got to jump up and scream." Mr. Brown stated that "[t]he State would object to [the escrow arrangement] most strenuously." Mr. Brown noted that a refund remedy, if necessary, would be more appropriate. In light of the State's strenuous opposition to an escrow arrangement, the State's present assertion that McKesson could have secured an escrow arrangement is disingenuous at best.

Contrary to the State's assertions, McKesson pursued every available opportunity to seek relief.

CONCLUSION

Unfortunately, this Court's Commerce Clause decisions have not prevented Florida (and other states) from creating an unconstitutional whipsaw: enacting successive discriminatory tax schemes and denying the victims any retroactive relief. McKesson's constitutional challenge to Florida's taxation scheme squarely presents the question of whether, and to what

extent, the federal Constitution limits the states' retention of unconstitutional taxes.

Dated: September 19, 1988

Respectfully submitted,

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No. 88-192

Supreme Court, U.S.

FILED

JAN 6 1989

JOSEPH F. SPANOL, JR.
CLERK

In the Supreme Court

OF THE United States

OCTOBER TERM, 1988

McKesson Corporation,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

DEPARTMENT OF BUSINESS REGULATION, and

OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

JOINT APPENDIX VOLUME I

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PETITION FOR CERTIORARI FILED, July 28, 1988
CERTIORARI GRANTED, November 14, 1988

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CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LEON COUNTY, FLORIDA

Case No. _____
FL. BAR # 353574

McKESSON CORPORATION
(dba McKESSON WINE & SPIRITS
CO., MIAMI CROWN DISTRIBUTORS,
and PALM BEACH CROWN
DISTRIBUTORS),

Plaintiff,

v.

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,

Defendants.

COMPLAINT

Plaintiff McKesson Corporation, which does business as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors in Florida ("McKesson"), for its complaint against the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation ("Division"), and the Office of the Comptroller, State of Florida ("Comptroller"), alleges:

PARTIES

1. At all relevant times, McKesson has been a distributor of domestic and imported alcoholic beverages at wholesale licensed by the Division pursuant to section 561.14, Florida Statutes (1985).

2. The Division, pursuant to Article IV, Section 6, Florida Constitution and section 20.16(2)(a), Florida Statutes (1985) is a part of the executive branch of state government. The Division, pursuant to sections 561.02, 561.07, 561.08, 561.11, and 562.17, Florida Statutes (1985) has the power and duty to supervise, collect, audit, and enforce the alcoholic beverage taxes imposed by Florida law.

3. The Comptroller is the constitutional officer authorized and directed by Article IV, Section 4(d), Florida Constitution, and section 215.26, Florida Statutes (1985) to administer the refund of monies paid into the State Treasury.

JURISDICTION

4. This Court has jurisdiction of this action, involving more than \$5,000, pursuant to Article V, Sections 5(b) and 20(c)(3), Florida Constitution; Chapter 86 and section 215.26, Florida Statutes (1985); and Florida Rules of Civil Procedure 1.630.

INTRODUCTION

5. Before the Florida Legislature enacted Chapters 85-203 and 85-204, Laws of Florida, Florida's alcoholic beverage laws contained a statutory scheme that discriminated in favor of Florida manufacturers and distributors and Florida products in violation of the United States Constitution, Article I, Section 8, clause 3 (Commerce Clause); United States Constitution, Article I, Section 10, clause 2 (Import-Export Clause); United States Constitution, Amendment XIV, Section 1 (Equal Protection Clause); and Article I, Section 2 (Equal Protection Clause), Florida Constitution. The discriminatory provisions of Florida law were referred to by Florida legislators and officials as the "Florida Products Exemption".

6. Following the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Florida Legislature repealed the Florida Products Exemption. In its place, the Legislature enacted sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). The Florida Legislature enacted the Revised Florida Products Exemption in light of Florida's preeminence in the manufacture of alcoholic beverages from certain agricultural products and in the production of certain agricultural products. Florida manufacturers are among the primary manufacturers of alcoholic beverages from citrus fruits, citrus byproducts, sugarcane, sugarcane byproducts, and varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniani*, or *Vitis berlandieri* (the "Enumerated Grape Species"). Florida is the primary United States producer of citrus fruits and citrus byproducts. Only Florida, California, Texas, Arizona, Louisiana, and Hawaii producers grow citrus in commercially significant amounts in the United States. Florida is the primary United States producer of sugarcane and sugarcane byproducts. Only Florida, Hawaii, Louisiana, and Texas producers grow sugarcane in commercially significant amounts in the United States. Florida is the primary producer of the Enumerated Grape Species in the United States. Florida's producers grow only the Enumerated Grape Species for the production of wine.

7. The Revised Florida Products Exemption continues to discriminate in favor of Florida products and the manufacturers and distributors of such products. Accordingly, the Revised Florida Products Exemption violates the United States Constitution, Article I, Section 8, clause 3 (Commerce Clause); United States Constitution, Article I, Section 10, clause 2 (Import-Export Clause); United States Constitution Amendment, XIV, Section 1, (Equal Protection Clause); and Article I, Section 2 (Equal Protection Clause), Florida Constitution.

8. The Revised Florida Products Exemption is so vague, ambiguous, and uncertain as to be incapable of constitutional, non-

discriminatory application. Accordingly, the Revised Florida Products Exemption violates the United States Constitution, Amendment XIV, Section 1 (Due Process Clause), and Article I, Section 9 (Due Process Clause), Florida Constitution.

9. The Revised Florida Products Exemption requires state officials to inquire into the tax, economic, agricultural, and export laws and policies of foreign countries and attempts to affect such laws and policies. Accordingly, the Revised Florida Products Exemption involves the State of Florida in foreign affairs and international relations, matters which the United States Constitution entrusts solely to the Federal Government.

10. The Revised Florida Products Exemption requires McKesson to pay unconstitutional taxes on wine and wine coolers as follows:

10.1 Section 564.06(1), Florida Statutes (1985) imposes a tax of \$2.25 per gallon on beverages, including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight. In contrast, to favor Florida manufacturers and products, section 564.06(2), Florida Statutes (1985) grants a discriminatory exemption from this tax for all wines, except natural sparkling wines, whose alcoholic content is manufactured exclusively from certain products, *i.e.*, citrus fruits, the Enumerated Grape Species, or concentrates thereof. Further, section 564.06(2), Florida Statutes (1985) grants a discriminatory exemption for all other such beverages, except malt beverages, whose alcoholic content is manufactured exclusively from certain Florida products, *i.e.*, citrus fruits, the Enumerated Grape Species, citrus byproducts, sugarcane, sugarcane byproducts, or concentrates thereof.

10.2 Section 564.06(3), Florida Statutes (1985) imposes a tax of \$3.00 per gallon on all wines, except natural sparkling wines, containing 14 percent or more alcohol by weight. In contrast, to favor Florida manufacturers and products, section 564.06(3), Florida Statutes (1985) grants a discriminatory exemption from this tax for all such wines whose alcoholic content is manufactured exclusively from

certain products, *i.e.*, citrus fruits, the Enumerated Grape Species, or concentrates thereof.

10.3 Section 564.06(4) Florida Statutes (1985) imposes a tax of \$3.50 per gallon on natural sparkling wines. In contrast, to favor Florida manufacturers and products, section 564.06(4), Florida Statutes (1985) grants a discriminatory exemption from this tax for natural sparkling wines whose alcoholic content is manufactured exclusively from certain products, *i.e.*, citrus fruits, the Enumerated Grape Species, or concentrates thereof.

11. The revised Florida Products Exemption also requires McKesson to pay unconstitutional taxes on liquors as follows:

11.1 Section 565.12(1)(a), Florida Statutes (1985) imposes a tax of \$6.50 per gallon on beverages containing 14 percent or more of alcohol by weight and not more than 48 percent, except wines. In contrast, to favor Florida manufacturers and products, section 565.12(1)(b), Florida Statutes (1985) sets a discriminatory, preferential tax rate of \$4.35 per gallon for all such beverages whose distilled spirits are manufactured exclusively from certain products, *i.e.*, citrus products, citrus byproducts, sugarcane, or sugarcane byproducts.

11.2 Section 565.12(1)(b), Florida Statutes (1985) imposes a tax of \$9.53 per gallon on beverages containing more than 48 percent alcohol by weight. In contrast, to favor Florida manufacturers and products, section 565.12(2)(b), Florida Statutes (1985) sets a discriminatory, preferential tax rate of \$4.95 per gallon for all such beverages whose distilled spirits are manufactured exclusively from certain products, *i.e.*, citrus products, citrus byproducts, sugarcane, or sugarcane byproducts.

12. Florida's statutory scheme also contains provisions that assure that the benefits of the Florida Products Exemption are not available to the products of other states and countries ("Take-Back Provisions"). Specifically, sections 564.06(9)(a) to (c) and 565.12(c)(1) to (3),

Florida Statutes (1985) deny tax exemptions and preferences to the following:

a. Alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

b. Alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries;

c. Alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

13. Manufacturers seeking the tax exemptions and preferences authorized by sections 564.06 and 565.12, Florida Statutes (1985) for their products must apply to the Division between July 1 and July 31 of each year for a license. The Division has never granted such a license to any out-of-state manufacturer. The Division has granted licenses to Florida manufacturers, but only for alcoholic beverages made exclusively from Florida products.

14. Sections 564.06(12) and 565.12(10), Florida Statutes (1985) allow the State to police its unconstitutional discrimination in favor of Florida manufacturers and distributors and Florida products by requiring manufacturers who qualify for tax exemptions or preferences to report monthly on the source of raw materials for the manufacture of the products.

15. McKesson has been a distributor of, and has been required by sections 564.06 and 565.12, Florida Statutes (1985) to pay unconstitutional taxes on, alcoholic beverages. McKesson, which has protested the payment of the unconstitutional taxes, has been required

to and has paid such taxes whether or not McKesson has been paid by its customers. McKesson has not distribute [sic] any alcoholic beverage that has benefitted from a tax exemption or preference under the Revised Florida Products Exemption.

16. Pursuant to section 215.26, Florida Statutes (1985), McKesson is entitled to a refund of alcoholic beverage taxes paid pursuant to Florida's unconstitutional statutory scheme.

17. On or about June 9, 1986, McKesson timely filed with the Division, as agent for the Comptroller, a proper application of refund of taxes paid pursuant to sections 564.06 and 565.12, Florida Statutes (1985). By Notice of Intent to Render Decision, received by McKesson on August 13, 1986, the Comptroller announced the intention to deny McKesson's application for a refund.

18. The granting of refunds by the Comptroller upon application showing a right thereto is a ministerial function of the Office of the Comptroller.

19. McKesson, having made proper and timely application for the refund of alcoholic beverage taxes, which application shows McKesson's right thereto, is legally entitled to a refund. The Comptroller, having refused to grant the requested refund, has failed to perform a ministerial duty of his office.

20. There exists between McKesson and the Division a present and actual controversy concerning the constitutionality and enforceability of sections 564.06 and 565.12, Florida Statutes (1985). In addition, there exists between McKesson and the Comptroller a present and actual controversy concerning the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985) and McKesson's right to a refund.

COUNT I

(United States Constitution, Commerce Clause)

21. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 20.

22. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against and burden interstate and foreign commerce and, thus, violate the United States Constitution, Article I, Section 8, Clause 3 (Commerce Clause).

COUNT II

(United States Constitution, Import-Export Clause)

23. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 22.

24. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly lay imposts or duties on imports and, thus, violate the United States Constitution, Article I, Section 10, Clause 2 (Import-Export Clause).

COUNT III

(United States Constitution, Equal Protection Clause)

25. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 24.

26. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against McKesson and others and, thus, violate the United States Constitution, Amendment XIV, Section 1 (Equal Protection Clause).

COUNT IV

(United States Constitution, Due Process Clause)

27. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 26.

28. Sections 564.06 and 565.12, Florida Statutes (1985) are impermissibly vague, ambiguous, and uncertain and, thus violate the United States Constitution, Amendment XIV, Section 1 (Due Process Clause).

COUNT V

(United States Constitution, Foreign Affairs)

29. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 28.

30. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly involve the State of Florida in foreign affairs and international relations and, thus, violate the United States Constitution.

COUNT VI

(Florida Constitution, Equal Protection Clause)

31. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 30.

32. Sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against McKesson and others and, thus, violate Article I, Section 2 (Equal Protection Clause), Florida Constitution.

COUNT VII

(Florida Constitution, Due Process Clause)

33. McKesson hereby incorporates by reference the allegations of paragraphs 1 through 32.

34. Section 564.06 and 565.12, Florida Statutes (1985) are impermissibly vague, ambiguous and uncertain and, thus, violate Article I, Section 9 (Due Process Clause), Florida Constitution.

PRAYER

WHEREFORE, McKesson prays that this court enter orders:

- (a) Declaring that sections 564.06 and 565.12, Florida Statutes (1985) violate the United States and Florida Constitutions and, accordingly, are void and unenforceable;
- (b) Declaring McKesson to be entitled to a refund of alcoholic beverage taxes as set forth above, together with interest;
- (c) Issuing an injunction preventing the Division from enforcing sections 564.06 and 565.12, Florida Statutes (1985); and
- (d) Issuing an injunction or writ of mandamus compelling the Comptroller to grant a refund to McKesson of alcoholic beverage taxes as set forth above, together with interest, and
- (e) Awarding McKesson such other and further relief, such as reasonable attorney's fees and costs of suit, as the Court may deem proper.

Dated: September 3, 1986

/s/ Martha W. Barnett
Martha W. Barnett
James M. Ervin, Jr.
HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, Florida 32301
(904) 224-7000

and

David G. Robertson
John D. Danforth
MORRISON & FOERSTER
California Center
345 California Street
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(415) 434-7000

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE No. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

ANSWER

COME NOW Defendants, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA and answer the Complaint in this cause and say:

FIRST DEFENSE

This Court lacks jurisdiction over the subject matter of the action.

The provisions of § 564.06 and § 565.12, *Fla. Stat.* (1985) which grant the partial tax exemption and which establish a separate tax rate for exempted products were enacted as an inseparable unit. Those provisions are severable from the provisions of the statute which impose the tax. Therefore, Plaintiff lacks the requisite personal stake as a taxpayer to confer standing upon it to challenge the statutes.

Plaintiff does not allege competitive injury as a distributor by reason of the existence of the exemptions. Plaintiff is not a manufacturer of alcoholic beverages. Plaintiff therefore lacks standing to challenge the statutes.

SECOND DEFENSE

The taxes for which Plaintiff seeks refunds were included by Plaintiff in the sales prices charged by Plaintiff to licensed retail vendors for alcoholic beverages sold by Plaintiff to such vendors.

Such taxes were included in the sales prices charged for alcoholic beverages distributed by Plaintiff in addition to all other taxes, costs and overhead expenses incurred by Plaintiff with regard to the sale of Plaintiff's products, and in addition to the margin of profit included by Plaintiff in the sales prices of its products. Plaintiff did not bear the financial burden of the tax and lacks standing to seek a refund.

Therefore, this Court lacks subject matter jurisdiction over the subject matter of the action.

THIRD DEFENSE

Plaintiff has failed to join certain parties whose presence before the Court is indispensable to Plaintiff's cause of action and whose interests would be adversely affected by the relief which Plaintiff seeks, to wit: Those persons or corporations presently holding licenses granting reduced tax rates for alcoholic beverage products under Sections 564.06 and 565.12, *Fla. Stat.* (1985). Those persons or corporations - Todhunter International, Inc.; Fruit Wines of Florida, Inc.; Jacquin-Florida Distilling Company; and Lafayette Vineyards and Winery, Ltd. - are within the jurisdiction of the Court. Their joinder is indispensable to do complete justice and equity, inasmuch as a declaration that Sections 564.06 and 565.12, *Fla. Stat.*, are unconstitutional and an injunction against the present Defendants to prevent enforcement of the terms of those statutes would effect the interests and rights of those corporations regarding their existing licenses to manufacture alcoholic beverages granted exemption or partial exemption.

In further answer, Defendants respond to each correspondingly numbered paragraph of the Complaint and say:

1. Admitted.
2. Admitted.
3. Admitted.

4. Denied.

5. Without knowledge.

6. Defendants admit the allegations of the first and second sentence, except that the phrase "Revised Florida Products Exemption" is specifically denied. The Defendants are without knowledge of the remainder of the allegations of said paragraph.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

10.1 Defendants admit that § 564.06(1) imposes a tax of \$2.25 per gallon on beverages, including wines (except natural sparkling wines) and malt beverages, containing more than 1% alcohol by weight and less than 14% alcohol by weight and admit that § 564.06(2) provides for an exemption for products there enumerated. The remainder of the allegations of that paragraph are denied.

10.2 Defendants admit that a tax of \$3.00 per gallon is imposed on wines containing 14% or more alcohol by weight in § 564.06(3) and that said section provides an exemption from the tax for the products enumerated therein. Otherwise, the allegations of that paragraph are denied.

10.3 Defendants admit that § 564.06(3) imposes a tax on natural sparkling wines of \$3.50 per gallon and that said section grants an exemption to products enumerated therein. Otherwise, the allegations of that paragraph are denied.

11. Denied.

11.1 Defendants admit that § 565.12(1)(a) imposes a tax of \$6.50 per gallon on alcoholic beverages, except wines, containing 14% or more alcohol by weight and not more than 48% alcohol by weight and that §565.12(1)(b) provides a lower tax rate for products there enumerated. Otherwise, the allegations of that paragraph are denied.

11.2 Defendants admit that §565.12(2)(a) imposes a tax of \$9.53 per gallon on beverages containing more than 48% alcohol by weight and that §565.12(2)(b) provides a lower tax rate on products there enumerated. Otherwise, the allegations of that paragraph are denied.

12. Defendants admit that §564.06(9)(a)-(c), and 565.12(1)(c), (2)(c) were enacted and read as alleged. Otherwise, the allegations of that paragraph are denied.

13. Defendants admit that new applicants must apply between July 1 and July 31 and that entities previously granted a license under said statutes must annually seek renewal between those dates. Defendants admit that no license has been granted to an out-of-state manufacturer. Defendants deny the remaining allegations of that paragraph.

14. Defendants admit that §564.06(12) and § 565.12(10) were enacted and speak for themselves. Otherwise, the allegations of that paragraph are denied.

15. Defendants admit that McKesson is a distributor and has been required to pay taxes under §§ 564.06 and 565.12, *Fla. Stat.* Defendants deny that McKesson has protested payment of taxes under §§ 564.06 and 565.12, *Fla. Stat.* (1985). Defendants admit that McKesson is responsible for the taxes due whether or not it has been paid by its customers, but Defendants are without knowledge as to whether McKesson has remitted taxes for which it has not [been] reimbursed by its customers. Defendants are without knowledge as to the remaining allegations of that paragraph.

16. Denied.

17. Admitted.

18. Denied.

19. Denied.

20. Denied.

21. Defendants incorporate their answers to paragraphs 1-20.

22. Denied.

23. Defendants incorporate their answers to paragraphs 1-20.

24. Denied.

25. Defendants incorporate their answers to paragraphs 1-20.

26. Denied.

27. Defendants incorporate their answers to paragraphs 1-20.

28. Denied.

29. Defendants incorporate their answers to paragraphs 1-20.

30. Denied.

31. Defendants incorporate their answers to paragraphs 1-20.

32. Denied.

33. Defendants incorporate their answers to paragraphs 1-20.

34. Denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The provisions of §564.06(2), (3), (4), (9), and (10), *Fla. Stat.* (1985) were enacted as an inseparable unit. Said subsections are severable from the remaining provisions of §564.06, *Fla. Stat.* (1985).

SECOND AFFIRMATIVE DEFENSE

The provisions of §565.12(1)(b); (c); (2)(b), (c); (5) and (6), *Fla. Stat.* (1985) were enacted as an inseparable unit. Said subsections are severable from the remaining provisions of §565.12, *Fla. Stat.* (1985).

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
904/487-2142

COUNSEL FOR DEFENDANTS

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

NO. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

DEFENDANTS' FIRST REQUEST FOR ADMISSIONS

The Defendants hereby request Plaintiff to admit the following:

DEFINITIONS

"Wines" refers to those items of alcoholic beverage upon which an excise tax is imposed by § 564.06, Florida Statutes.

"Liquors" refers to those items of alcoholic beverage upon which an excise tax is imposed by § 565.12, Florida Statutes.

"You" refers to Plaintiff in this action and its employees and authorized agents.

"Refund period" refers to the period from and after July 1, 1985 for which you are seeking refund of excise taxes paid pursuant to §§ 564.06 and 565.12, Florida Statutes (1985).

"Customers" refers to retail vendors and excludes military vendors and other wholesale distributors.

REQUESTS FOR ADMISSION

With reference to the above-defined terms, Defendants request that you admit the truth of the following facts and matters:

1. That during 1981 you distributed and sold 24,031.94 gallons of liquor which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 565.12, *Fla. Stat.* (1981 - 1984 Supp.)

2. That during 1982 you distributed and sold 6,956.52 gallons of liquor which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 562.12, *Fla. Stat.* (1981 - 1984 Supp.)

3. That during 1981 you distributed and sold 705 gallons of wine which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 564.06, *Fla. Stat.* (1981 - 1984 Supp.)

4. That during 1982 you distributed and sold 321.45 gallons of wine which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 564.06, *Fla. Stat.* (1981 - 1984 Supp.)

5. That during the refund period the taxes for which you seek a refund were included in the sales prices charged by you for wines and liquors sold by you to licensed retail vendors, in addition to all other taxes, costs, and overhead expenses incurred by you with regard to the sale of those products, and in addition to the profit included by you in the sales price of those products.

6. For each unit of product of wines and liquors sold by you to licensed retail vendors during the refund period the taxes for which you seek a refund were included in the sales prices charged for each such unit of product and were included in such prices in addition to all other taxes, costs, overhead expenses incurred by you with respect to the sale of such units of product, and in addition to the profit included by you in the sales prices for such units of product.

7. For each unit of product of wines and liquors sold by you to licensed retail vendors during the refund period, the taxes for which you seek a refund became part of the debt due from the retail vendors to you and, upon delivery of the products, were collectible as any other debt due to you.

(a) That you have been fully paid for all units of wine and liquor products which you distributed to your customers during the refund period to and including September 6, 1986.

8. During the refund period, you were not licensed as a manufacturer of alcoholic beverages in Florida or elsewhere and did not operate as such.

9. During the refund period if a manufacturer's product in which you dealt as a distributor was exempt or partially exempt from the beverage excise tax by reason of § 564.06 or § 565.12, *Fla. Stat.* (1985), such exemption was available for your benefit equally as compared with other distributors who dealt in the same product.

10. During the refund period, if a manufacturer's product in which you dealt as a distributor was not exempt or partially exempt from the beverage excise tax imposed by § 564.06 or § 565.12, *Fla. Stat.* (1985) all distributors dealing in such product paid the full excise tax imposed.

11. During the refund period, you paid beverage excise taxes on wines and liquors in which you dealt, which products were not exempt or partially exempt from the tax, without protesting to Defendants or the State of Florida the payment of the tax, without voicing question to Defendants or to the State regarding constitutionality of the provisions of § 564.06 and § 565.12, *Fla. Stat.* (1985), and without advising Defendants or the State that refund of such taxes might be sought based on the alleged unconstitutionality of those statutes.

12. During the refund period, you were aware that the beverage excise taxes paid on wines and liquors which were not exempt or partially exempt from the tax would be appropriated and expended for governmental operations and programs.

13. The taxes paid during the refund period until June 30, 1986 have been appropriated and expended for governmental operations and programs.

14. That during the refund period you were approached by Jacquin-Florida Distilling Co. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

15. That you declined the offer referred to in paragraph 14.

16. That during the refund period you were approached by Lafayette Vineyards & Winery, Ltd. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

17. That you declined the offer referred to in paragraph 16.

18. That during the refund period you were approached by Todhunter International, Inc. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.*, (1985) or both.

19. That you declined the offer referred to in paragraph 18.

20. That prior to January, 1985, you voluntarily withdrew from the distribution of products which qualified for the exemptions provided in §§ 564.06 and 565.12, *Fla. Stat.* (1981 - 1984 Supp.).

21. That you were offered by Todhunter International, Inc., Jacquin-Florida Distilling Co., or Lafayette Vineyards & Winery, Ltd., or all of them, the opportunity to distribute their products which

qualified for exemption or partial exemption from the beverage excise tax under §§ 564.06 and 565.12, *Fla. Stat.* (1981 - 1984 Supp.).

22. That you declined the offer or offers referred to in paragraph

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, Florida 32399-1050
904/487-2142
ATTORNEY FOR
DEFENDANT

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE No. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

DEFENDANTS' FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS

Defendants' hereby request Plaintiff to produce the following documents for inspection and copying at Room 210, Montgomery Building, Koger Executive Center, Apalachee Parkway, Tallahassee, Florida, or at a location of Plaintiff's choosing convenient to the inspection and copying thereof:

1. All documents identified in response to Defendant's First Interrogatories.
2. All memoranda, reports, written recommendations, and written directions to or by the person or persons responsible for pricing decisions [sic] with regard to wine and liquor sold by you during the time period January 1, 1977 - January 1, 1978 and January 1, 1983 - January 1, 1984, which documents address the pricing of such wine and liquor sold by you during those time periods.
3. All documents which constitute, reflect, or refer to pricing calculations or work sheets with respect to wine and liquors sold by you for the periods of January 1, 1977 - January 1, 1978 and January 1, 1983 - January 1, 1984.
4. All sales invoices for wine and liquor sold by you during the months of May - August, 1977 and during the months of July - October, 1983.

5. All memoranda and other documents in your possession, other than those prepared in anticipation of this litigation, which discuss or refer to the constitutionality or unconstitutionality or the legality or illegality of the excise tax imposed on wine and liquor by §§564.06 and 565.12, *Fla. Stat.*, and the exemption provided by those statutes to wine and liquor products produced from Florida-grown products and bottled in Florida.

6. The minutes of all meetings of your board of directors from January 1, 1977 to date.

7. All reports to stockholders from January 1, 1977 to date.

8. All records pertaining to stockholders' meetings held since January 1, 1977.

9. All notices of protest delivered to Defendants or to the State of Florida by you on your behalf regarding payment of beverage excise taxes from January 1, 1980 to date.

10. All written communication from and after January 1, 1980 between you and Todhunter International, Inc.; Jacquin-Florida Distilling Company [sic] or Lafayette Vineyards & Winery, Ltd.; or all

of them; regarding your distribution or possible distribution of their wines and liquors.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, Florida 32399-1050
904/487-2142

ATTORNEY FOR DEFENDANT

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MOTIONS FOR
PARTIAL SUMMARY JUDGMENT AND FOR A PRELIMINARY
INJUNCTION

Plaintiff McKesson Corporation ("McKesson"), by and through its attorneys, hereby moves this Honorable Court as follows:

1. That the Court, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, enter partial summary judgment in favor of Plaintiff McKesson declaring that sections 564.06 and 565.12, Florida Statutes (1985) violate the United States Constitution and, accordingly, are unenforceable and void. In support of this motion, McKesson avers that, since no genuine issue as to any material fact exists, McKesson is entitled to a judgment as a matter of law.
2. That the Court, pursuant to Rule 1.610 of the Florida Rules of Civil Procedure and this Court's equitable power, enter a preliminary injunction enjoining Defendant Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, from enforcing sections 564.06 and 565.12, Florida Statutes (1985).
3. That the Court grant such other and further relief as the Court may deem proper.

McKesson moves the Court pursuant to Rule 1.510, of the Florida Rules of Civil Procedure and pursuant to Rule 1.610 of the Florida Rules of Civil Procedure and this Court's equitable power and bases the motions: upon this motion, the memorandum in support of the

motion, the affidavits in support of the motion, and all the other pleadings, papers, and documents on file; upon this Court's judicial notice of official actions of Florida legislative and executive departments; and upon any oral arguments to the Court at the hearing on the motions.

Wherefore, McKesson Corporation respectfully prays that the Court enter the requested orders.

Dated: October 16, 1986.

/s/ James M. Ervin, Jr.
Martha W. Barnett
James M. Ervin, Jr.
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Post Office Drawer 810
Tallahassee, FL 32302
(904) 224-7000

and

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MEMORANDUM
IN SUPPORT OF ITS MOTIONS FOR
PARTIAL SUMMARY JUDGEMENT AND FOR A PRELIMINARY
INJUNCTION

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.....McKesson's Appendix

Plaintiff McKesson Corporation ("McKesson") submits this memorandum in support of its motions for partial summary judgment and for a preliminary injunction.

McKesson asks this Court to determine that sections 564.06 and 565.12, Florida Statutes (1985) are unconstitutional under the federal Constitution.

INTRODUCTION

McKesson does business in Florida as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors. (Collins' Affidavit, ¶ 3.) McKesson, which is licensed by the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, under section 561.14, Florida Statutes (1985), has distributed domestic and imported alcoholic beverages at wholesale and has paid excise taxes on alcoholic beverages under sections 564.06 and 565.12, Florida Statutes (1985). (Collins' Affidavit, ¶¶ 3 and 4.)

On September 3, 1986, McKesson filed a Complaint in the Circuit Court, Second Judicial Circuit, Leon County, challenging Florida's alcoholic beverage tax as unconstitutional under the federal and state constitutions. McKesson's Complaint raises a challenge very similar to Tampa Crown and Florida Beverage's Complaint in the Circuit Court in Case No. 86-773. All three corporations, which are Florida distributors, assert that Florida in 1985 enacted an unconstitutional tax.

McKesson, which has standing to challenge the constitutionality of the Revised Florida Products Exemption, asks this Court to grant its

motions for partial summary judgment and for a preliminary injunction on the basis of the following federal constitutional issues:

First, sections 564.06 and 565.12, Florida statutes (1985), impermissibly discriminate against interstate and foreign commerce and, thus, violate the United States Constitution's Commerce Clause. The Florida legislature intentionally designed the Florida statutes to continue Florida's historic tax policies of protecting Florida products and industry, and the statutes effectively discriminate against commerce among the states and with foreign nations.

Second, the sections impermissibly involve Florida in foreign affairs and international relations and, thus, violate the United States Constitution. The Florida statutes disrupt the federal government's exclusive jurisdiction over the regulation of foreign affairs by, in general, requiring Florida to make determinations concerning other countries' activities and, in specific, permitting Florida to obstruct various federal programs.

Third, the sections impermissibly discriminate against foreign imports and, thus, violate the United States Constitution's Import-Export Clause. The Florida statutes effectively impose a duty upon imports.

THE REVISED FLORIDA PRODUCTS EXEMPTION

Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held a Hawaii liquor tax exemption for locally produced alcoholic beverages unconstitutional as a violation of the Commerce Clause, Florida's alcoholic beverage laws contained a statutory scheme that granted an excise tax exemption to beverages manufactured and bottled in Florida from Florida products. The similarity between the Florida law, Florida Statutes sections 564.06 and 565.12 (Supp. 1984) ("Florida Products Exemption"), and the Hawaii law struck down in *Bacchus* prompted the Florida legislature to alter the language of the statute.

During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). The legislature removed the word "Florida" from the sections and substituted language identifying certain agricultural products whose use in the production of the alcoholic beverages would entitle the manufacturers and distributors to a tax break. The sections, one applying to wines, section 564.06, and one applying to distilled spirits, section 565.12, divide into three relevant parts.

First, the sections impose a per gallon tax on the alcoholic beverages, which varies according to the percentage of alcohol by weight.

Second, the sections provide a tax exemption for wines and a tax preference reduction for distilled spirits when the alcoholic content of the beverages is manufactured exclusively from certain designated products. The Florida statutes' designated products are all Florida products. Florida, which cannot produce the grape species that grape producers throughout the world generally produce for the manufacture of wine and wine coolers, *Vitis Vinifera*, has included among its designated grape species the six grape species that Florida does produce for the manufacture of wine and wine coolers, *Vitis Rotundifolia*, *Vitis Aestivalis* ssp. *Simpsoni*, *Vitis Aestivalis* ssp. *Smalliana*, *Vitis Shuttleworthii*, *Vitis Munsoniana*, and *Vitis Berlandieri*. (Olmo's Affidavit, ¶¶ 3 and 4.) Florida, which is one of the few states to produce citrus and is the predominant producer of citrus, has included citrus fruits, citrus products, and citrus byproducts among the designated products. (Peck's Affidavit, ¶ 4.) Florida, which is also one of the few states to produce sugarcane and is the leader in the production of sugarcane, has included sugarcane and sugarcane byproducts among the designated products. (Peck's Affidavit, ¶ 5.)

Third, the sections establish a set of provisions which take back the tax exemption or tax reduction under certain circumstances ("Take Back Provisions"). The tax breaks are not granted to the following:

- (a) Alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;
- (b) Alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or
- (c) Alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Sections 564.06 and 565.12, Florida Statutes (1985).

Under the 1985 statutory scheme and the rules of the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, the Division reviews the laws and programs of the applicant's home state or country to determine whether any of the above conditions apply. Manufacturers seeking the tax breaks must apply to the Division between July 1 and July 31 of each year. Under sections 564.06(12) and 565.12(10), manufacturers who receive the tax breaks must report monthly on the source of raw materials for the manufacture of the products.

I. McKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

The United States Supreme Court, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), established that a liquor wholesaler has standing to challenge the constitutionality of a state liquor excise tax

upon the wholesaler's products. The Court in *Bacchus* held that when a wholesaler must pay the tax on its products to the state, the wholesaler has standing to challenge the tax. *Id.* at 267.

The Florida Supreme Court, in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), adopted an expansive view of standing in a case challenging the constitutionality of a Florida gasohol tax scheme. The Court held that a plaintiff has standing to challenge the constitutionality of a tax statute if enforcement of the statute adversely affects the plaintiff's personal or property rights, even if the plaintiff is not liable for the tax. *Id.* at 1375-76.

Under the decisions in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), McKesson plainly has standing to challenge the constitutionality of the Florida statutes in this Court. McKesson, as a distributor of alcoholic beverages, is liable for the tax. (Collins' Affidavit, ¶¶ 3 and 4.) Under sections 564.06 and 565.12, Florida Statutes (1985), McKesson, as a distributor, has paid the excise taxes on its products to the State whether its customers have paid for products or not. (Collins' Affidavit, ¶ 4.) Moreover, McKesson's products, which did not receive the tax exemptions and preferences, have competed with other distributors' products, which did receive the tax exemptions and preferences. (Collins' Affidavit, ¶¶ 7 and 8.) As a result, McKesson has suffered economic losses. (Collins' Affidavit, ¶ 9.) Consequently, Florida's enforcement of the tax has adversely affected McKesson's property rights.¹

¹ Florida cannot argue that McKesson does not have standing to challenge the tax statute because it could receive the tax exemptions and preferences by selling the favored products. The majority in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), rejected a similar standing argument suggested by the dissent.

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

The Commerce Clause² enforces our overriding national interest in free, unrestricted trade among the states through a national common market. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977). The Commerce Clause federalizes regulation of foreign and interstate commerce and restricts internecine actions among the states. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949). Thus, each state cannot "legislate according to its estimate of its own interests [and] the importance of its own products." *Id.* at 533 (quoting Story, *The Constitution*, §§ 259, 260).

The United States Supreme Court has adopted a two-tiered approach in reviewing Commerce Clause cases. Where state legislation effects economic protectionism, the Court has declared a "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Where state legislation advancing legitimate local interests affects interstate commerce only incidentally and employs the least burdensome alternative, the Court will permit the legislation. *Id.*

The Revised Florida Products Exemption's scheme of tax exemptions and preferences fails on both levels of constitutional analysis. The State has sought to protect its local commerce at the expense of interstate competition. In so doing, the State offends the cardinal rule of Commerce Clause jurisprudence that no state may erect a tax scheme that provides a direct commercial advantage to local business by discriminating against interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984). The Commerce Clause does not allow Florida to advance its parochial interests at our national economy's expense.

² The Commerce Clause, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."

A. The Revised Florida Products Exemption Constitutes Economic Protectionism and, Therefore, Is Unconstitutional.

This Court may find economic protectionism either in discriminatory purpose or in discriminatory effect. Either condition is sufficient to condemn a statute. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 270. The "evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. at 626. The Florida legislation is demonstrably protectionist and discriminatory in both its purpose and its effect.

1. The Florida Legislature Designed the Florida Law to Protect Florida Commerce from Interstate Competition.

The Florida legislature, intending to protect certain Florida agricultural products, and to protect the manufacturers using those products, enacted the Revised Florida Products Exemption. From among the legion of agricultural products used for the making of wines and distilled spirits, the legislature decided to favor citrus, sugarcane, and certain species of grapes by granting these products a commercial advantage in the market. In its selectivity, the legislature knew that only Florida and a few other states produce the favored agricultural products in commercial quantities. The legislature then attached the Take Back Provisions to ensure that Florida could deny the tax breaks to products from the few other states that do in fact produce the favored agricultural products.

This Court's review of the Florida statutes' legislative history will reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism.³ Two dominant themes emerge from the legislative history.

³ When the lawmakers' purposes in enacting a statute appear in the legislative history, the Supreme Court has focused on that history to identify the legislative intent. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42 n.8 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (testimony before a state Senate committee supported the inference that the legislature had passed a

First, the Florida legislature intended the new statutory scheme to retain the protectionist character of the former Florida Products Exemption, which unconstitutionally discriminated in favor of Florida manufacturers and distributors and Florida products.

Representative Jones, a sponsor of the new legislation, explained the purpose behind the Revised Florida Products Exemption during testimony before three Florida House of Representatives Committees. On April 23, 1985, before the House Committee on Regulated Industries and Licensing, Mr. Jones stated:

The legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country. . . . I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

(McKesson's Appendix, Exhibit A, at 1.) Before the House Committee on Appropriations, Mr. Jones stated: "What we're doing here is to retain those 300 jobs that have been developed in Florida as

challenged provision in response to the pleas of local businesses seeking protection from competition); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law challenged on Commerce Clause grounds). See also *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" may show the discriminatory purpose).

Florida courts have also reviewed legislative history to ascertain the legislature's purpose. See, e.g., *E.M. Watkins & Co. v. Board of Regents*, 414 So. 2d 583, 587 (Fla. Dist. Ct. App. 1982) (legislative committee hearings are "strongly indicative of the legislative intent in enacting [a] statute"); *Speights v. Florida*, 414 So. 2d 574, 576 (Fla. Dist. Ct. App. 1982) (tracing the legislative history of an act is relevant in discerning the legislative intent).

a result of our policies towards Florida products." (McKesson's Appendix, Exhibit C, at 1.) Representative Hargrett, a co-sponsor of the legislation, testified before the same Committee:

Chairman, ladies and gentlemen of the Committee, I just wanted to say this bill is necessary in order to preserve the home state wine industry that we've begin [sic.] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill.

Id. at 3. During Mr. Jones' testimony before the Appropriations Committee, the Chairman commented that representatives from the grape industry had contacted him. Mr. Jones assured him that the legislation would in fact "take care of them." *Id.* at 4. Before the House Committee on Finance and Taxation, Mr. Jones stated:

I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. . . .

With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits.

(McKesson's Appendix, Exhibit B, at 1-4.)

Before the Florida Senate Commerce Committee on May 9, 1985, Senator Crawford, the Senate sponsor, reiterated the same theme:

Frankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. . . .

It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State.

(McKesson's Appendix, Exhibit D, at 1.) Before the Florida Senate Finance and Taxation Committee on May 14, 1985, Senator Crawford stated that the bill "maintains the status quo on the current exemption that we have." (McKesson's Appendix, Exhibit E, at 1.)

On the House floor, during the May 28, 1985 debate of the Revised Florida Products Exemption bills, Mr. Jones noted that Florida had "granted a benefit to the distillers in Florida using Florida products for many years." (McKesson's Appendix, Exhibit 6, at 2.) Mr. Jones explained that while the United States Supreme Court's decision in *Bacchus* had disturbed the status quo, the sponsors did not intend to abandon the tax exemption. "We're simply trying to protect what was in place prior to this Supreme Court decision." *Id.* at 2-3. During the House floor debates on May 28, 1985 and May 31, 1985, Mr. Jones referred to the legislation as "Florida Products bills." (McKesson's Appendix, Exhibit G, at 1-10.)⁴

Second, the Florida legislators hoped to circumvent the Commerce Clause holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), by continuing to favor Florida commerce. During the the Senate Commerce Committee deliberations, the Chairman responded to another senator's concern that, while encouraging the use of Florida products, the tax exemptions might also encourage the use of out-of-state citrus, grapes, and sugarcane:

[t]he reality is we have a way constitutionally of giving support to industry that would locate in this state, would give jobs to this state and would pay taxes in the state and the way we're doing it it would meet the criteria established by the

⁴ Florida's executive department records demonstrate that the Governor's office recognized the legislative intent of the revised law to preserve the protectionist purpose of the former law. (McKesson's Appendix, Exhibit H and Exhibit I.)

Supreme Court and all the practical effects in reality is going to accomplish exactly what we want. We could argue theory but I think reality is much more important.

(McKesson's Appendix, Exhibit D, at 11.) The Senator added --

[w]hat Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that.

Id. at 13. Immediately before the Senate Committee voted to adopt the bill, Senator McPherson concluded:

[t]he way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida.

Id. at 14.

During the Florida Senate Finance and Taxation Committee meeting on May 14, 1985, Senator Grant objected that the sponsors of the Revised Florida Products Exemption intended to maintain the protection of the Florida alcoholic beverage industry but would not continue to protect the Florida gasohol industry, and argued that the legislature should link the protection of both industries.

Senator, I thought that one bill addressed, that both bills in fact address the same point. I thought it was the production of jobs, the continuation of use of Florida products without saying so because that was a constitutional issue . . . I wonder why we want to continue one exemption and remove another.

(McKesson's Appendix, Exhibit E, at 2-3.) Senator Crawford, in response, explained that the sponsors had found disagreement among Florida producers regarding how the legislature should proceed with gasohol legislation, but no such disagreement among Florida producers regarding how the legislature should proceed with alcoholic beverage legislation. *Id.* at 3. Senator McPherson then added this candid observation:

I think the difference is that by exercising your good bill here will help Florida people, Florida businesses and the exemption of the gasohol the way it was so written was allowing foreign people to take advantage of it. It's the philosophy as far as exemptions is probably the same, but it's who gains is what's important.

Id. at 4.

As the legislative history strikingly demonstrates, the legislature altered the former Florida Products Exemption but maintained the protectionist purpose and effect in the new law.

2. The Florida Law Effectively Protects Florida Commerce from Interstate and Foreign Competition

Florida's producers and other states' and countries' producers compete for sales to manufacturers of alcoholic beverages. With respect to wine and wine coolers, Florida's producers, who cannot grow the species that most consumers prefer, *Vinifera*, but can grow the Florida species, compete with other states' and countries' producers, who can grow the *Vinifera* species. (Olmo's Affidavit, ¶¶ 2-5.) With respect to liquor, Florida's producers of citrus and sugarcane compete with other states' and countries' producers, who frequently cannot grow citrus or sugarcane but can grow alternative crops. (Peck's Affidavit, ¶¶ 3-13.)

The Revised Florida Products Exemption favors Florida's producers in the competition in interstate and foreign markets and prevents other states' and countries' producers from competing on

equal terms. With respect to wine and wine coolers, the Florida statute counters Florida's inability to produce the preferred *Vinifera* species and other states' and countries' ability to produce the preferred favored species by providing tax exemptions only for species which Florida can produce. (Olmo's Affidavit, ¶¶ 2-5.) With respect to liquor, the Florida statute builds on Florida's historic preeminence in the production of citrus and sugarcane and many other states' and countries' inability to produce citrus and sugarcane by providing tax preferences only for citrus and sugarcane. (Peck's Affidavit, ¶¶ 3-13.)

In other words, Florida has decreed that its grape, citrus, and sugarcane producers shall have a commercial advantage over certain other states' and countries' producers in the competition for sales to the manufacturers of alcoholic beverages. Thus, the manufacturers who use the Florida law's favored products obtain a commercial advantage from their lowered cost as a result of the tax breaks. (Peck's Affidavit, ¶¶ 3-13.) Such anticompetitive protectionism clashes with "the common market created by the Framers of the Constitution." *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, Inc.* 424 U.S. 366, 380 (1976).

The Supreme Court has invoked the Commerce Clause to restrict the means by which a state can constitutionally seek to promote its own industry. The Court has repeatedly applied Justice Cardozo's formulation of the rule:

Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935). Recently, the Supreme Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), applied the rule to a state's attempt to favor local interests with respect to the manufacture of alcoholic beverages. The Court in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), summarized the *Bacchus* holding:

Thus, in *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry" [468 U.S. 263, 271, (1984)], we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business [*Id.* at 278].

In reviewing a state's restrictions on interstate commerce, the Supreme Court looks to the restrictions' practical effect. For example, in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court found that a city regulation, which on its face purported to advance health and safety, had the practical effect of discriminating against interstate commerce, rendering the regulation unconstitutional. The Court in *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), stated the basic rule:

The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

Id. at 455-56. See also *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981) (Court must focus on state tax provisions' "practical effect"); *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (Court must assess state tax "in light of its actual effect"); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980) (the Court's "principal focus of inquiry must be the practical operation of the statute").

The Florida Supreme Court has recognized the United States Supreme Court's approach. For example, in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 317 (Fla. 1984), the Florida Supreme Court held unconstitutional a statute that discriminated against interstate commerce by providing a commercial advantage to local commerce. The Court recognized that the statute's practical effect was the focus of inquiry. *Id.* at 320.

The Revised Florida Products Exemption, which establishes a preferential trade area for the designated products, offends the Commerce Clause through its practical effect. This Court easily can construct examples of the Florida Law's unconstitutional practical effect. Three illustrations will suffice:

- (1) A winemaker who uses a species of grape that does not grow in Florida incurs higher taxes than a winemaker who uses Florida grapes;
- (2) A vodka manufacturer who uses Maine potatoes or Swedish grain incurs higher taxes than a vodka manufacturer who uses Florida citrus;
- (3) A brandy distiller must use a prime Florida agricultural product, sugarcane, instead of Michigan's or Barbados' beet sugar to qualify for the economic advantage.

Thus, the Florida act disadvantages the interstate movement of other states' agricultural products that do not receive the Florida tax break and that compete in the Florida market with the Florida-favored products. (Peck's Affidavit, ¶¶ 3-13.) The United States district court in *Mapco, Inc. v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979), declared unconstitutional an Ohio statute imposing taxes on coal whose practical effect resembled the Florida law's effect. The Ohio legislature did not expressly restrict tax advantages to Ohio coal, but subjected high-sulfur coal to a lower tax rate than low-sulfur coal. The vast bulk of Ohio's coal production was of the high-sulfur grade. The court found that the tax scheme disadvantaged the interstate movement of low-sulfur coal and thereby constituted a *prima facie* violation of the Commerce Clause. The court observed: "[s]urely a competent purchasing agent of a steam-electricity generating utility would consider this . . . price differential when deciding whether to purchase Ohio high-sulfur coal or Kentucky low-sulfur coal." *Id.* at 408.

Moreover, the discriminatory Florida tax act divests the out-of-state growers of any competitive advantages they would otherwise have and

confers advantages on local growers. Florida, which cannot grow *Vitis Vinifera*, the grape species that consumers usually prefer, has decided to subsidize the grape species it can produce. (Olmo's Affidavit, ¶¶ 2-5.) Florida, whose predominant products face competition for markets from other states' products, has attempted to affect many other states' ability to compete. (Peck's Affidavit, ¶ 6 and 9.)

The Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), found unconstitutional a North Carolina statute that had a similar practical effect. The North Carolina statute interfered with the prevailing free market forces by boosting the competitive advantage of local growers and dealers at the expense of out-of-state growers and dealers. *Id.* at 350-52. The statute offered the North Carolina apple industry "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." *Id.* at 352. The Florida tax scheme exhibits the same defect.

Under the Commerce Clause, Florida cannot pass a law decreeing that products from Florida and a few other states will be taxed at one rate and products from the remaining states will be taxed at a higher rate. The Revised Florida Products Exemption has the same practical effect. As the court stated in *Mapco, Inc. v. Grunder*, where in practical operation a state's statute favors its own products, it "is no less invalid because it is not cast in terms of location. The commerce clause forbids both forthright and insidious discrimination." 470 F. Supp. at 410 n.14.

The Florida law's Take Back Provisions further discriminate against interstate commerce. The provisions prevent out-of-state manufacturers and distributors who do in fact use the Florida-favored products from receiving the tax breaks. The law grants the Florida Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, the discretion to determine whether the state, territory, or country in which the alcoholic beverage is manufactured or bottled:

- (1) "discriminates" against alcoholic beverages manufactured or bottled outside of its boundaries;
- (2) provides "economic incentives or advantages" exclusively for alcoholic beverages produced within its boundaries; or
- (3) provides "export subsidies" for agricultural products used in making the alcoholic beverages. Upon an affirmative finding by the Florida agency with respect to any of the above conditions, Florida withholds the tax breaks.

Far from fostering a "level playing field" for interstate commerce, the Revised Florida Products Exemption's vague, ambiguous provisions force out-of-state dealers (who use the Florida-favored products to avoid the statutes initial competitive barrier) to enter a minefield resulting from Florida's interpretation of laws or programs.⁵ Under the law, for example, if Florida determines that California provides "export subsidies" for agricultural products used in making alcoholic beverages, then a California manufacturer of wine from oranges would not receive the tax advantages. However, if Florida determines that Oregon does not "discriminate" against alcoholic beverages, an Oregon manufacturer using those same California oranges would receive the tax exemption. Indeed, given the statutes' vague language, the only safe haven for a firm wishing to compete on equal terms in Florida is to move to Florida.

The legislature may have been far too clever in designing the Take Back Provisions to prevent out-of-state producers from competing on even terms in Florida. Predictably, Florida has not turned the Florida statutes against local interests by ruling that the law, itself, constitutes Florida discrimination and, therefore, that Florida firms do not qualify for the tax exemption. But, certainly, New York might construe the Florida law as discriminatory, warranting reciprocal discrimination

⁵ The Supreme Court has stated that "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080, 2086 n.5 (1986).

against Florida firms. Expanding the scenario, each state might allow its agencies to scrutinize other states' laws and, upon a finding of discrimination, authorize discrimination in turn against the offending state. This is the very kind of commercial warfare the Commerce Clause was designed to prevent. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949).

Florida cannot save its discriminatory law with the assertion that the law actually promotes free interstate commerce. Florida stands the Commerce Clause on its head by assuming that it authorizes a state to erect trade barriers in response to trade barriers.

In *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976), in which a Louisiana milk producer challenged a Mississippi regulation requiring certain trade reciprocity, the Supreme Court considered similar reasoning. The Court rejected Mississippi's argument that its reciprocity requirement encouraged free trade among states by forcing a state that had been protecting its own producers to eliminate trade barriers. Where a state unconstitutionally burdens interstate commerce by protecting its own producers from competition, "the Commerce Clause itself creates the necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause." *Id.* at 380.

Similarly in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), a challenge to Nebraska's reciprocity requirement for the interstate transportation of ground water, the Court held that the reciprocity provision erected an impermissible barrier to interstate commerce and could not survive the "strictest scrutiny" reserved for discriminatory legislation. *Id.* at 957-58. Furthermore, the Court noted, citing *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, "[t]he reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 958 n.18.

In an action challenging reciprocal truck taxes, the Supreme Judicial Court of Maine applied *Cottrell* to find unconstitutional a state tax scheme that "had as its candid purpose coercive retaliation to force the 13 'offending' states to drop the extra tax burdens they impose on Maine trucks." *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986). To the extent, if any, that the other states were unconstitutionally burdening interstate commerce, the Court held that the Commerce Clause itself provided the constitutional remedy. "A state may not violate the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation." *Id.*

Interestingly, Florida rejected Canandaigua Wine Company's application for the tax exemption after determining that New York, Canandaigua's home state, discriminated in favor of New York wine products. The particular New York legislation faced a challenge in court on constitutional grounds. In *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y. 1985), *aff'd and modified*, 761 F.2d 140 (2d Cir. 1985), the court applied the Commerce Clause to find that the New York Alcoholic Beverage Control Law, intended to aid the New York grape industry, constituted unconstitutional economic protectionism. *Loretto Winery* underscores the point made by the Supreme Court in *Cottrell*: the Commerce Clause, in lieu of a retaliatory free-for-all among the states, provides the constitutional means for challenging protectionist state legislation.

The State cannot support its retaliatory provisions by citing *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), or *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985). Both inapposite cases, which involved the insurance industry, were expressly decided on Equal Protection Clause grounds.⁶ Judicial scrutiny under the Commerce

⁶ "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act [15 U.S.C.A. §§ 1011 through 1015 (West 1976)]." *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. at 653.

Clause is more exacting than under the Equal Protection Clause. See *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869. The Florida Supreme Court in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 317 (Fla. 1984), reaffirmed this Commerce Clause rule. The Court determined that a lower court's reliance on a particular case was "misplaced because that case involved a challenge to a state excise tax based upon equal protection and due process arguments. The commerce clause was not an issue in that case." *Id.* at 321.

Moreover, unlike the Florida Take Back Provisions, California's retaliatory tax scheme in *Western & Southern Life Insurance Co. v. State Board of Equalization* was precisely proportional. See 451 U.S. at 650-51. Under the Florida provisions, the state agency makes no attempt to calibrate any manufacturer's perceived advantage before denying the substantial commercial advantage conferred by the Florida law. The most trivial "economic incentive" provided by an out-of-state firm's home state might preclude the firm's receipt of the Florida tax break, whether the particular firm ever benefited from the incentive or not.

The Revised Florida Products Exemption, on its face, discriminates against interstate commerce. Florida has sought a shortsighted parochial advantage at the expense of the national common market. The law's protectionist purpose coincides with its practical effect. Both the purpose and the effect make the statutes unconstitutional.

B. The Revised Florida Products Exemption Imposes an Unconstitutional Burden on Interstate Commerce.

If the Revised Florida Products Exemption did not have a protectionist purpose and effect and, thus, were not *per se* unconstitutional, Florida's alcoholic beverage tax scheme still would violate the Commerce Clause because it places an excessive burden on interstate commerce. The Commerce Clause requires this Court not only to determine whether the law is protectionist in purpose or effect, but also to inquire:

- (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;
- (2) whether the statute serves a legitimate local purpose; and, if so,
- (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). See also *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).⁷ The Florida Revised Products Exemption fails to satisfy even one of these requirements for constitutionality.

1. The Florida Tax Neither Regulates Even-Handedly nor Creates only Incidental Effects on Interstate Commerce.

As discussed above, Florida's taxing scheme is not evenhanded. Florida grants a tax exemption or preference to certain agricultural products and selects the products for no reason other than the fact of their cultivation in Florida. In this way, the burden of the Florida tax – far from being evenhanded – falls on those distributors who, lacking tax advantages, must sell higher-priced, non-Florida goods and suffer a corresponding loss of sales. (Peck's Affidavit, ¶¶ 3-13.)

The Florida tax's effects on interstate commerce are not "incidental." Florida's tax law does not directly affect only local goods and, thus, only incidentally affect interstate commerce when those goods are sold. Rather, Florida's purposefully limited tax scheme seeks to favor Florida products and to disfavor foreign

⁷ The Supreme Court's formulation of this test in *Pike v. Bruce Church*, 397 U.S. 137 (1970), makes even more clear that even a non-protectionist state statute may be unconstitutional if it creates excessive burdens on interstate commerce: "[w]here the statute regulates evenhandedly to effectuate a legitimate local purpose and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

products in interstate commerce. (Peck's Affidavit, ¶¶ 11 and 13.) The taxing scheme's easily invoked, vaguely worded Take Back Provisions make this purpose clear. The direct result of Florida's alcoholic beverage tax scheme is the prohibited effect on interstate commerce. (Peck's Affidavit, ¶¶ 11 and 13.)

2. The Florida Tax Does Not Serve a Legitimate Local Purpose.

As discussed above, Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. This purpose is illegitimate, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

Florida's desire to nurture local industry represents an attempt to further a purely economic purpose that – whether the implementation is non-discriminatory or not – is constitutionally suspect under the Commerce Clause. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 530-39 (1949). Accord L. Tribe, *American Constitutional Law* § 6-12, at 340-42 (1978) (contrasting health and safety laws with local economy laws). As the Supreme Court noted in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980):

In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

Id. at 43-44.

Florida's putative desire to respond to other states' discriminatory laws also carries no constitutional weight. In order to respond to another state's economic barriers, Florida cannot construct laws to

coerce the other state's legislature to lower its barriers. Rather, as noted above, Florida or its citizens should merely file an action under the Commerce Clause. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 380 (1976).

Moreover, the Florida tax cannot survive Commerce Clause scrutiny by attempting to compensate Florida products for any disadvantages other states may inflict. Even if Florida's compensating disadvantaged products were a legitimate state goal, the Florida tax irrationally relates its advantages for specific products under specific circumstances to the disadvantages the specific products suffer under other states' statutes. Florida's identification of any home state advantage (no matter how small) results in the loss of all Florida benefits (no matter how large). For example, if a New York manufacturer received a New York state subsidy of ten cents a gallon on wine exports to Florida, the manufacturer would lose his entire Florida exemption of as much as \$3.50 per gallon. The statute's failure to calibrate its impact is a fatal constitutional defect. See *Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982) (state must narrowly tailor any reciprocity requirement to the state's legitimate purposes).

3. The Florida Tax Imposes Excessive Burdens on Interstate Commerce.

Florida's tax scheme necessarily achieves its purposes by placing a disproportionate burden on interstate commerce. Therefore, Florida has the burden of demonstrating that the local benefits from its tax outweigh the burden on interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977). Florida must justify its discriminating tax "both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. at 336. See also *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982). Florida cannot possibly carry this burden of proof.

Assuming, *arguendo*, that Florida can show that its tax scheme has nurtured the local industry, Florida could have achieved the same result using means less discriminatory than a disproportionate tax on non-Florida alcohol. Indeed, several such alternatives have received express judicial approval under the Commerce Clause.

Among the many less discriminatory alternatives, Florida could have provided state income or property tax relief to Florida's manufacturers or growers. The courts have approved this method of encouraging local industry. See, e.g., *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 864 (S.D.N.Y. 1985) (property tax relief is permissible to promote winemaking). This type of non-discriminatory tax reform, which relieves local competitors of a tax, does not isolate non-Florida competitors for unique tax burdens and thus does not violate the "cardinal rule of Commerce Clause jurisprudence" that a state may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977), and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

As another less discriminatory alternative, Florida could have stimulated its agricultural industry with direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for Florida products. See generally *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. at 864 (discussing several alternatives).

In other words, Florida can effectively promote its industry without violating the Commerce Clause precept that it not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 337.

III. THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

The Revised Florida Products Exemption violates a fundamental premise of federal-state relations. By authorizing its courts to inquire into foreign governments' policies and by attempting to change those policies that Florida finds distasteful, Florida has intruded impermissibly into the exclusively federal area of foreign affairs. Accordingly, Florida's statutes are unconstitutional. See *Zschernig v. Miller*, 389 U.S. 429, 430-41 (1968); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1376-80 (D.N.M. 1980); *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. 800 (Ct. App. 1969); L. Tribe, *American Constitutional Law* § 4-5, at 172 (1978); 2 C. Antieau, *Modern Constitutional Law* § 10:19, at 37-38 (1969). Cf. *Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941); *United States v. Belmont*, 301 U.S. 324, 327-32 (1937).

The framers of the federal Constitution feared that individual states might impair foreign relations by unilateral action in the international sphere. "The peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." *The Federalist* No. 80, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original).

In accordance with the clear intentions of the framers, the Supreme Court has declared without ambiguity that the individual state "does not exist" in the realm of foreign affairs. *United States v. Belmont*, 301 U.S. 324, 331 (1937). "Whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." *Id.* at 331-32.

The Supreme Court applied these principles in *Zschernig v. Miller*, 389 U.S. 429 (1968), to invalidate an Oregon statute that conditioned the right of aliens to inherit property on the existence of reciprocal rights for United States citizens in foreign countries. The Oregon statute required state courts to inquire into the laws and policies of foreign governments and induced foreign nations to frame their inheritance laws in a manner that would insure Oregonians reciprocal inheritance rights. *Id.* at 433-41. The Supreme Court found that the Oregon statute "ha[d] a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. Accordingly, the statute was unconstitutional as a form of "state involvement in foreign affairs and international relations - matters which the Constitution entrusts solely to the Federal Government." *Id.* at 436. See also *Tayyari v. New Mexico State University*, 495 F. Supp. at 1377-80; *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. at 802.

Florida's statutes, like Oregon's statute in *Zschernig v. Miller*, "illustrate the dangers which are involved if each State, speaking through its . . . courts, is permitted to establish its own foreign policy." 389 U.S. at 441. Florida's intrusion into foreign affairs, however, is even deeper than Oregon's. Unlike the reciprocal inheritance statute in *Zschernig*, Florida's statutes directly conflict with specific, definitive articulations of United States foreign policy. Congress, to whom the Constitution exclusively entrusts the regulation of "Commerce with foreign Nations," has enacted laws that pervasively regulate the imposition of customs duties on foreign imports. Federal law preempts state tax laws that intrude into this exclusively federal field. U.S. Const., art. I, § 8, cl. 3 (Commerce Clause). See *Xerox Corp. v. County of Harris*, 459 U.S. 145, 159 (1982); *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940).

Congress' preemption of a field withdraws all legislative power from the individual states. "[W]here the federal government, in the exercise of its superior authority in [a] field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."

Graham v. Richardson, 403 U.S. 365, 378 (1971) (quoting from *Hines v. Davidowitz*, 312 U.S. 52, 66—67 (1941)) (immigration). See also *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982) (customs).

Since federal legislation has preempted the field of customs regulations, this Court need conduct no further inquiry to find that the Revised Florida Products Exemption is unconstitutional. Further inquiry, however, illustrates specific conflicts between federal and Florida law.

Florida's Take Back Provisions deny tax preferences and exemptions to the products of countries that provide certain economic advantages to their own producers. Fla. Stat. §§ 564.09 and 565.12 (1985). The Florida Attorney General's office has candidly described the Take Back Provisions as an effort to "foster a 'level playing field'" in the alcoholic beverages trade. See "Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment," at 4 (filed July 21, 1986, in Case No. 86-773). Florida's statutes are designed to level the playing field in two ways: (1) by preventing "one-way 'double-dipping'" ("the granting of a compounded benefit to producers in jurisdictions which already allow an exclusive, parochial incentive for such products"); and (2) by "discourag[ing] the implementation or continuance of purely local favoritism in other jurisdictions." *Id.* at 3. In other words, Florida retaliates against countries that favor their own products and attempts to change the trade policies of other countries.

With these goals, Florida's statutes cannot pass muster under the Supremacy Clause. Federal legislation preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1940). Florida's Take Back Provisions are an obstacle to the Congressional purposes expressed in specific laws that direct the United States' commerce with foreign nations. These laws include the Trade Act of 1974, as amended (19 U.S.C.A. §§ 2411 through 2415 (West Supp. 1986)); the Tariff Act of 1930, as amended (19 U.S.C.A. §§ 1301 through 1677h (West Supp. 1986)); the

Caribbean Basin Economic Recovery Act (19 U.S.C. §§ 2701 through 2706 (West Supp. 1986)); and the Wine Equity and Export Expansion Act of 1984 (19 U.S.C.A. §§ 2801 through 2806 (West Supp. 1986)). Florida's statutes also violate the United States' international obligations under the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6) (1947). Each of these federal laws preempts Florida's.

A. The Trade Act of 1974.

Congress, in the Trade Act of 1974, gave the President broad authority to negotiate trade agreements and to respond to actions by foreign countries that disadvantage United States commerce. Congress saw the need "to prevent a serious deterioration in the spirit of economic cooperation that is essential for the preservation of economic and political stability in a rapidly changing world." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7188). Florida, by taking unilateral action to level the international playing field, has unconstitutionally intruded into this exclusive federal area.

Section 301(a) of the Trade Act, as amended, authorizes the President to take "all appropriate and feasible action within his power" to "respond to any act, policy, or practice of a foreign country" that is "unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce." 19 U.S.C.A. § 2411(a)(1)(B)(ii) (West Supp. 1986). Congress considered the President's retaliatory authority "a vital aspect of the trade negotiations" that the Trade Act authorized. S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7208-09). In the exercise of his broad statutory power, the President may selectively impose discriminatory tariffs and other restrictions against particular products and particular foreign countries. 19 U.S.C.A. § 2411(a)(2)(A) & (B) (West Supp. 1986). For example, the President recently authorized quantitative restrictions on certain European wine imports in response to European Economic Community restrictions on various United States products. 51 Federal Register 18,296 (May 16, 1986).

Congress has purposefully given the President central authority to direct the United States' response to burdens on its foreign commerce. The President must select the United States' retaliatory actions in light of international economics and politics. As Congress noted, "[t]rade policies cannot be divorced from other important contributions to, or influences on, the U.S. and world economies." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7189). Florida's unsanctioned interference in this process can only hinder the federal government's efforts to achieve beneficial trade relations for the whole United States.

B. The Tariff Act of 1930.

Section 303 of the Tariff Act of 1930, as amended, protects United States commerce from foreign subsidization of exports. Under the Tariff Act, whenever the Secretary of the Treasury determines that a foreign export has received a subsidy, the Secretary must levy a countervailing duty in the amount of the subsidy. 19 U.S.C.A. § 1303(a)(1) (West 1980).

Similarly, Florida's Take Back Provisions impose discriminatory taxes on alcoholic beverages from countries "which provide export subsidies for agricultural products used in making said alcoholic beverages" or "other economic incentives or advantages." Sections §§ 564.06(9)(b) & (c) 564.12(1)(c)(2) & (3), and §§ 565.12(2)(c), Florida Statutes (1985). By thus intruding into the area of foreign export subsidies, Florida's statutes frustrate the goals of the federal countervailing duty statute.

The federal Act was carefully drafted to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies." See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 456 (1978). The Secretary of the Treasury is empowered to establish regulations to "accurately carry out this purpose." *Id.* See also 19 U.S.C.A. §§ 1303(b) and 1677 (West 1980). In light of the federal policy of measured response, Florida cannot impose its own additional tax. Florida's discriminatory tax

frustrates Congress' intention to offset accurately foreign trade advantages.

C. The Caribbean Basin Economic Recovery Act (CBERA).

Congress enacted the Caribbean Basin Economic Recovery Act (CBERA) in 1983. The purpose of CBERA is to address "deep-rooted structural problems" in the Caribbean Basin which have "caused serious inflation, high unemployment, declining gross domestic product growth, enormous balance-of-payments deficits, and a pressing liquidity crisis." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 644). The legislative history demonstrates Congress' concern that "this economic crisis threatens political and social stability throughout the region and creates conditions which Cuba and others seek to exploit through terrorism and subversion." *Id.* (reprinted in 1983 U.S. Code Cong. & Admin. News 643, 644).

Through CBERA, Congress has addressed Caribbean Basin problems by authorizing the President to offer trade benefits to Caribbean nations that satisfy certain political, economic, and social criteria. 19 U.S.C.A. § 2702 (West Supp. 1986). "The centerpiece of the U.S. program is the offer of *one-way* free trade." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (reprinted in 1983 U.S. Code Cong. & Admin. News at 643, 644) (emphasis added). See also Message to the Congress Transmitting the Proposed Caribbean Basin Economic Recovery Act, 18 Weekly Comp. Pres. Doc. 323 (Mar. 17, 1982). CBERA authorizes a *complete* exemption from United States customs duties for most products, including sugarcane rum, from qualified Caribbean nations. Congress specifically intended to increase sales of Caribbean rum by reducing the price to U.S. consumers. CBERA eliminates the usual \$10.50 per proof gallon excise tax on imported distilled spirits. H. Rep. No. 98-26, 98th Cong., 1st sess., at 26 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 667). See 19 U.S.C.A. § 2701 (West Supp. 1986).

Florida, a major producer of sugarcane, competes in the market for alcoholic beverages with several Caribbean nations. (Collins' Affidavit, ¶ 8.) The Revised Florida Products Exemption affects, for example, the rum market by granting preferential tax rates to alcoholic beverages made from Florida sugarcane. Florida's potential denial of these preferences to Caribbean rum would frustrate the federal policies expressed in CBERA. At the same time the United States seeks to *decrease* the price of Caribbean rum through an exemption from customs duties, Florida threatens to *increase* the price through its Take Back Provisions. The federal purposes expressed in CBERA will fail if Florida is free to impose a tax that offsets the competitive advantages that Congress has conferred. Cf. *Xerox Corp. v. County of Harris*, 459 U.S. 145, 152 (1982).

Further, Florida's administration of the Take Back Provisions directly involves Florida courts in impermissible foreign policy judgments. The factors that the Florida legislature has directed its courts to consider in applying the Take Back Provisions overlap with the factors that the President considers in determining whether to grant a particular Caribbean nation beneficiary status under CBERA. For example, a Florida court applying the Take Back Provisions considers whether a foreign country "impose[s] discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries," "provide[s] agricultural price supports or other economic incentives or advantages," or "provide[s] export subsidies." Sections 564.06 and 565.12, Florida Statutes (1985). Under CBERA, the President considers:

(3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country;

...

(5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade

19 U.S.C.A. §§ 2702(c)(3), 2702(c)(5) (West Supp. 1986). In essence, Florida law directs Florida courts to make unauthorized foreign policy judgments that may subvert the President's and Congress' legitimate foreign policy judgments.

D. The Wine Equity and Export Expansion Act of 1984.

The Wine Equity and Export Expansion Act of 1984 is Congress' effort to remedy "a substantial imbalance in international wine trade." 19 U.S.C.A. § 2801(a)(1) (West Supp. 1986). Like Florida, Congress was concerned that "the United States wine industry faces restrictive tariff and nontariff barriers in virtually every existing or potential foreign market." *Id.* The Act requires the President to "direct the [United States] Trade Representative to enter into consultations with each major wine trading country to seek a reduction or elimination of that country's tariff barriers and nontariff barriers to (or other distortions of) trade in United State wine." 19 U.S.C.A. § 2804(a) (West Supp. 1986). The Act also authorizes the President to take action under the Trade Act of 1974 to respond to foreign trade barriers. 19 U.S.C.A. § 2804(c) (West Supp. 1986).

Florida's Take Back Provisions directly intrude into the federal government's diplomatic and regulatory activities in this area. Florida imposes its own discriminatory tax on "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries." Sections 564.06(9)(a), 565.12(1)(c)(1), and 565.12(2)(c)(1), Florida Statutes (1985). Florida's sharing some of the federal government's goals in this area does not provide a legitimate occasion for Florida to make foreign policy. "Only the federal government can fix the rules of fair competition when such competition is on an international basis." *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. at 800, 803 (Cal. Ct. App. 1969). "[T]he existence of [a] federal Act cannot serve as a justification for state legislation since . . . it is the sole province of the federal government to act in this sphere." *Id.* at 804 n.8.

E. The General Agreement on Tariffs and Trade (GATT).

In the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6), the United States and its major trading partners have pledged to refrain from specific discriminatory trade practices. The Take Back Provisions of the Revised Florida Products Exemption directly conflict with the United States' obligations under GATT.

GATT prohibits discriminatory taxes such as Florida's with the following provision:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin.

GATT, pt. II, art. III, § 1, 61 Stat. (part 5) A18 (1947) (first sentence). By definition, any application of Florida's Take Back Provisions to the products of a foreign country would violate GATT. Whenever a Florida court applies a Take Back to a foreign product – thus withholding the tax exemption or preference afforded to Florida products – that product is burdened with "internal taxes . . . in excess of those applied directly or indirectly to like products of national origin."

GATT, as an international agreement, supersedes Florida law by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2. *See generally United States v. Belmont*, 301 U.S. 324, 331-32 (1937). Indeed, one court has held unconstitutional a state statute that contravened GATT by placing restrictions on the sale of foreign imports. *Territory v. Ho*, 41 Haw. 565, 567-71 (1955). However, regardless whether GATT directly preempts inconsistent state legislation, GATT is also an authoritative articulation of United States foreign policy with which Florida may not interfere. Thus, Florida's interference with foreign policy is invalid under *Zschernig v. Miller*, 389 U.S. 429 (1968).

Florida's attempt at the regulation of foreign affairs is, in a word, unconstitutional.

IV. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE

The Import-Export clause provides:

No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws

U.S. Const. art. 1, § 10, cl. 2. The Import-Export Clause's purpose is to insure that, in regulating commercial relations with foreign governments, the United States is able to "speak with one voice." *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276, 285 (1976). Thus, the clause prohibits any discriminatory tax by a state on imported goods and not merely direct taxes on importation. *Id.* at 288 n.7. *See also Cook v. Pennsylvania*, 97 U.S. 566 (1878).

The Revised Florida Products Exemption, by authorizing the denial of tax exemptions to foreign alcohol, effectively imposes a duty upon imports. As a result, Florida's statutes violate the Import-Export Clause of the United States Constitution. U.S. Const., art. I, § 10, cl. 2; *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976); *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374, 1376 (Fla. 1984).

As discussed above, Florida's Take Back Provisions expressly authorize discrimination based on national origin. The Take Back Provisions empower Florida courts and officials to examine and judge the agricultural and trade policies of foreign governments. This examination presupposes calculated discrimination. In effect, Florida's statutes frustrate the Import-Export Clause's purpose by creating foreign policy and invading the federal government's exclusive jurisdiction over the regulation of commerce with other nations.

The Import-Export Clause, as the Supreme Court interprets it, leaves no room for the Revised Florida Products Exemption. In *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976), the Court made clear that a state tax may not constitutionally "fall on imports as such because of their place of origin." *Id.* at 286. Although the Import-Export Clause does not accord imported goods preferential treatment, it "clearly prohibits state taxation based on the foreign origin of the imported goods." *Id.* at 287. The Court in *Michelin Tire Corp.* approved a nondiscriminatory state property tax because, unlike Florida's statutes, "it [could not] be used to create special protective tariffs or particular preferences for certain domestic goods, and it [could not] be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." *Id.* at 286.

For over a century, the Supreme Court has not hesitated to invalidate discriminatory state taxes on imports. In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), for example, the Court held unconstitutional a ten-cent-a-gallon tax imposed by Kentucky on all persons bringing distilled spirits into the state. Kentucky's law, like Florida's, discriminatorily taxed liquor from other states and countries. When challenged under the Import-Export Clause by an importer of Scottish whiskey, the Kentucky law succumbed. See also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827) (invalidating discriminatory tax on imports); *Cook v. Pennsylvania*, 97 U.S. 566, 569 (1878) (invalidating taxes at retail level that favored certain specified domestic goods).

In addition, the Florida Supreme Court's own analysis of the Import-Export Clause agrees with the United States Supreme Court's. In the recent case of *Miller v. Publicker Industries, Inc.*, 457 So. 2d 1374 (Fla. 1984), the Florida Supreme Court held unconstitutional a Florida tax that exempted motor fuels containing a stated percentage of alcohol. The exemption applied, however, only to alcohol distilled from United States agricultural products. The Florida Supreme Court held the tax exemption unconstitutional because it "constitute[d] discriminatory taxation based upon the foreign origin of a product in violation of the import-export clause." *Id.* at 1376.

The Florida Supreme Court's analysis in *Publicker* applies here. The tax in *Publicker* expressly favored goods of "U.S. origin." The Revised Florida Products Exemption's discrimination is less obvious in its effect on foreign goods because the legislature drafted the statute using generic descriptions of Florida products. Nevertheless, in this case, as in *Publicker*, the Florida legislature has authorized discrimination based on national origin. Moreover, as in *Publicker*, Florida can discourage the consumption of foreign products by applying the Revised Florida Products Exemption's Take Back Provisions.

Florida's tax scheme is unconstitutional under the Import-Export Clause.

V. THIS COURT SHOULD ENTER A PRELIMINARY INJUNCTION AGAINST FLORIDA'S ENFORCEMENT OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

During the pendency of this litigation, this Court should prevent further unconstitutional injury to McKesson and others by enjoining Florida's enforcement of the unconstitutional statutes. Unquestionably, this Court has that power. See, e.g., *Bailey v. Christo*, 453 So. 2d 1134, 1136-37 (Fla. Dist. Ct. App. 1984), review denied, 461 So. 2d 113 (Fla. 1985); *Department of Professional Regulation v. Florida Psychological Practitioners Association*, 461 So. 2d 198 (Fla. Dist. Ct. App. 1984).

Under Florida law, this Court may grant an injunction upon a showing: (1) that McKesson has a clear legal right to relief; (2) that McKesson does not have an adequate remedy at law; (3) that McKesson will otherwise suffer irreparable harm; and (4) that granting an injunction will not disserve the public interest. See, e.g., *Finkelstein v. Southeast Bank*, 490 So. 2d 976, 980 (Fla. Dist. Ct. App. 1986). McKesson satisfies each requirement.

A. McKesson Has a Clear Legal Right to Relief.

McKesson has demonstrated that Florida's statutes unconstitutionally burden interstate commerce, intrude into the federal government's exclusive power over foreign affairs, and place an impost or duty on imports. Accordingly, McKesson has a clear right to relief under the Commerce, Supremacy, and Import-Export Clauses of the United States Constitution.

B. McKesson Does Not Have an Adequate Remedy at Law.

McKesson submits that the only remedy that will adequately protect McKesson's rights is an injunction. Unless this Court enjoins further enforcement of Florida's unconstitutional statutes, McKesson and others will have to continue paying the tax and prosecuting actions for refunds. Avoidance of an illogical multiplicity of actions is a "well recognized basis for injunctive relief." *Dotolo v. Schouten*, 426 So. 2d 1013, 1015 (Fla. Dist. Ct. App. 1983). See also *Deltona Corp. v. Adamczyk*, 492 So. 463, 463 [sic] (Fla. Dist. Ct. App. 1986); *Carolina v. Regan*, 465 U.S. 367; *Dows v. Chicago*, 11 Wall. (78 U.S.) 108, 109-10 (1871).

Even in a series of refund actions, however, McKesson may not have an adequate remedy. McKesson has requested an award of interest, but the State will undoubtedly argue that it has no statutory obligation to pay interest. See, e.g., *Flack v. Graham*, 461 So. 2d 82 (Fla. 1984); *State ex rel. Four-Fifty Two-Thirty Corp. v. Dickinson*, 322 So. 2d 525 (Fla. 1975). The possible unavailability of interest makes McKesson's legal remedy inadequate and justifies the issuance of injunctive relief. A damage remedy that does not compensate McKesson for the loss over time of the use of millions of dollars is not an adequate remedy.

Courts have long recognized that a refund of taxes without interest is not an adequate remedy. In a leading case, Judge Learned Hand articulated the basic principles:

it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

Procter & Gamble Distributing Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y. 1924). Similarly, the court in *United States v. Livingston*, 179 F. Supp. 9, 15 (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960), stated: "[i]t is well settled that a right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the period during which the taxpayer's money is withheld." By denying interest on refunds, a state "necessarily opens the door to equitable relief to taxpayers and forecloses a remission of the parties to the legal remedy provided by her statute." *Id.* See also *Nutt v. Ellerbe*, 56 F.2d 1058, 1062 (E.D.S.C. 1932).

C. McKesson Will Suffer Irreparable Harm Without Injunctive Relief.

Even if Florida were to concede its liability for interest on any refund, Florida's unconstitutional discrimination against McKesson constitutes sufficient irreparable harm to justify an injunction. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2948 at 440 (1973 & Supp. 1986). See, e.g., *Electronic Data Systems Corporation Iran v. Social Security Organization of the Government of Iran*, 508 F. Supp. 1350, 1356 (N.D. Texas 1981).

D. The Public Has No Interest in Florida's Enforcement of an Unconstitutional Tax.

This Court's consideration of the public interest ends with a finding that Florida's statutes are unconstitutional. State statutes that place an unconstitutional burden on commerce, or interfere with the federal government's foreign affairs powers, or impose an impost or duty on imports do not serve the public interest. To the contrary, "the public has no interest in the enforcement of laws in an unconstitutional manner." *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) (granting injunctive relief under the Commerce Clause against state enforcement of state corporate takeover statutes). *Accord L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 209 (6th Cir. 1985).

The federal Constitution invalidates Florida's tax, and "the Constitution is the ultimate expression of the public interest." *Llewelyn v. Oakland County Prosecutor's Office*, 402 F. Supp. 1379, 1393 (E.D. Mich. 1975). Florida's citizens, as well as all other states' citizens, have an interest in maintaining free, unrestricted trade among the states. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977). This federal interest overrides each state's "estimate of its own interests [and] the importance of its own products." *See H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533-34 (1949) (quoting Story, The Constitution §§ 259, 260).

This Court's enjoining Florida's enforcement of the Revised Florida Products Exemption will vindicate the public interest through the enforcement of McKesson's and others' constitutional rights.

CONCLUSION

When the Florida legislature enacted the Revised Florida Products Exemption in 1985, the legislature hoped to avoid the Supreme Court's ruling in *Bacchus* but still preserve the State's policy of protection for parochial interests. The new Florida statutes did not cure the old statutes' defect. Florida continues to discriminate

impermissibly against interstate and foreign commerce in violation of the Commerce Clause and the Import-Export Clause. Moreover, the new statutes suffer from a new constitutional flaw. Florida, in its effort to construct a barrier to competition, has also encroached upon the federal government's exclusive power over foreign affairs. This Court must end Florida's violation of the federal constitution's proscriptions by finding the statutes unconstitutional and by enjoining their enforcement.

Dated: October 16, 1986.

/s/ James M. Ervin Jr.
Martha W. Barnett
James M. Ervin, Jr.
HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, FL 32302
(904) 224-7000

and

David G. Robertson
MORRISON & FOERSTER
California Center
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San Francisco, CA 94101
(415) 434-7000

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

No. 86-2997

(Caption omitted in printing)

THOMAS E. COLLINS' AFFIDAVIT IN SUPPORT OF
PLAINTIFF MCKESSON CORPORATION'S MOTIONS
FOR PARTIAL SUMMARY JUDGMENT AND FOR A
PRELIMINARY INJUNCTION

State of California)
)
County of San Francisco)

Before me this day personally appeared Thomas E. Collins who,
being duly sworn, deposes and says:

1. I am a resident of the State of Florida, am over 21 years of age, and have personal knowledge of the facts in this affidavit.
2. I am a Regional Vice President for McKesson Wine & Spirits Co. I supervise the operations of McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors in Florida.
3. McKesson Corporation, which does business in Florida as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors ("McKesson"), has been a wholesale distributor of domestic and imported alcoholic beverages in Florida and has been licensed by the Division of Alcoholic Beverages and Tobacco pursuant to section 561.14, Florida Statutes (Supp. 1985).
4. McKesson has paid excise taxes pursuant to sections 564.06 and 565.12, Florida Statutes (Supp. 1985) on the alcoholic beverages

that it sells to its customers in Florida. McKesson has paid such taxes whether or not McKesson has been paid by its customers for its products. On occasion, McKesson has not been paid by its customers for its products.

5. Since 1985, when sections 564.06 and 565.12, Florida Statutes (Supp. 1985) became effective, McKesson has been a distributor of alcoholic beverages that are taxed under sections 564.06(1), 564.06(3), 565.06(4), 565.12(1)(a), and 565.12(2)(a), Florida Statutes (Supp. 1985).

6. Since 1985, when sections 564.06 and 565.12, Florida Statutes (Supp. 1985) became effective, McKesson has not been a distributor of alcoholic beverages that benefit from the tax exemptions and preferences in sections 564.06(2), 564.06(3), 564.06(4), 565.12(1)(b), and 565.12(2)(b), Florida Statutes (Supp. 1985).

7. McKesson's products, which do not benefit from the tax exemptions in section 564.06, directly compete with other distributors' products which do benefit from the tax exemptions in section 564.06, Florida Statutes (Supp. 1985). For example, McKesson distributes wines containing more than one percent alcohol by weight and less than 14 percent alcohol by weight, such as Bartles & Jaymes wine coolers (from California), Calvin Coolers wine coolers (from Pennsylvania), Chantovent wines (from France), Folonari wines (from Italy), Gallo wines (from California), Papillon wines (from France), Piat D'Or wines (from France), Rene Junot wines (from France), Summit California wines (from California), and Takara Plum wines (from Japan), which do not benefit from the tax exemptions, that directly compete with Florida products such as Caribbean wine coolers, Florida wine coolers, Jean de Noir wine, Lafayette wines, Aorenz Blanc wine, and Palmetto Country wines, which do benefit from the tax exemptions; McKesson distributes wines containing 14 percent or more alcohol by weight, such as certain Gallo wines (from California), Harvey's Bristol Cream (from Spain), Harvey's Port (from Portugal), and Harvey's Sherry (from Spain), which do not benefit from the tax exemptions, that directly compete with Florida products such as Bacco and Blue Fox, which do benefit

from the tax exemptions; McKesson distributes natural sparkling wines such as Andre (from California), Paul Cheneau (from Spain), and Tosi Asti Spumanti (from Italy), which do not benefit from the tax exemptions, that directly compete with Florida products such as Lafayette sparkling wines, which do benefit from the tax exemptions. Many other McKesson products, which do not receive the tax exemptions, compete with the Florida products which do receive the tax exemptions.

8. McKesson's products, which do not benefit from the tax preferences in section 565.12, directly compete with other distributors' products that do benefit from the tax preferences in section 565.12, Florida Statutes (Supp. 1985). For example, McKesson distributes alcoholic beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, such as Absolut Vodka (from Sweden), Burrough's Vodka (from England), Gilbey's Vodka (from Ohio), Popov Vodka (from Connecticut), Smirnoff (from Michigan) Vikin Fjord Vodka (from Norway), Volga Vodka (from Maryland), Beefeater Gin (from England), Bellows Club Gin (from Ohio), Milshire Gin (from Connecticut), Bacardi Rum (from Puerto Rico), Don Q Rum (from Puerto Rico), Mt. Gay Rum (from Barbados), and Castillo Rum (from Puerto Rico), which do not benefit from the tax preferences, that directly compete with Florida products such as Five Flags Vodka, Saxony Vodka, Whitehall Vodka, Five Flags Gin, Saxony Gin, Whitehall Gin, Jose Gaspar Rum, Old Florida Rum, and Ron Matusalem Rum, which do benefit from the tax preferences. Many other McKesson products, which do not receive tax preferences, also compete with the Florida products which do receive tax preferences.

9. Since 1985, when sections 564.06 and 565.12, Florida Statutes (Supp. 1985) became effective, McKesson has suffered a significant loss in sales of its products as a result of the competition with other distributors' products that have received the tax exemptions and preferences.

/s/ Thomas E. Collins
THOMAS E. COLLINS, Affiant

Sworn to and subscribed before me this 9th day of October, 1986.

/s/ L. Margaret Birkhoffer
Notary Public

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

No. 86-2997

(Caption omitted in printing)

ANNE E. PECK'S AFFIDAVIT IN SUPPORT OF
PLAINTIFF McKESSON CORPORATION'S MOTIONS
FOR PARTIAL SUMMARY JUDGMENT AND FOR A
PRELIMINARY INJUNCTION

State of CALIFORNIA)
)
County of SANTA CLARA)

Before me this day personally appeared Anne E. Peck who, being
duly sworn, deposes and says:

1. I am a resident of the State of California, am over 21 years of age, and have personal knowledge of the facts in this affidavit.
2. I am Associate Professor and Associate Director of the Stanford Food Research Institute of Stanford University. I received my Bachelor of Science in mathematics from Stanford University in 1969, my Master of Arts from the Stanford Food Research Institute in 1970, and my Doctor of Philosophy from the Stanford Food Research Institute in 1973. From 1973 until 1976, I was Assistant Professor of Agricultural Economics at Purdue University. From 1980 until 1981, I was Visiting Associate Professor at the Harvard Graduate School of Business Administration. From 1976 until 1979, I was Assistant Professor at the Stanford Food Research Institute. Since 1979, I have been Associate Professor at the Stanford Food Research Institute. At these universities, I have taught courses on agricultural economics, including courses on agricultural prices and markets and commodity futures markets. I have served: as Project Director at the American

Enterprise Institute, from 1983 through 1984, directing the Study of the Economics and Regulation of Futures Markets; as Director at the Chicago Board of Trade Research Foundation, from 1978 through 1985; as Director at the American Agricultural Economics Association, from 1983 through 1985. I have served as an advisor to the World Bank and to the Food and Agriculture Organization of the United Nations. I have edited numerous books on futures markets and published more than a dozen articles on agricultural economics.

3. A manufacturer of alcoholic beverages could use any one of several of the grains and vegetables produced in the United States, such as corn, wheat, barley, potatoes, and sugar beets, in the manufacture of alcohol for alcoholic beverages. Almost all states commercially produce such grains and vegetables. According to United States Department of Agriculture statistics for 1980 through 1985, 47 states commercially produce corn in significant amounts; 42 states commercially produce wheat in significant amounts; 29 states commercially produce barley in significant amounts; 38 states commercially produce potatoes in significant amounts; and 13 states commercially produce sugar beets in significant amounts.

4. A manufacturer of alcoholic beverages could also use citrus fruit in the manufacture of alcohol for alcoholic beverages. Only a few states produce citrus in commercially significant amounts. According to United States Department of Agriculture statistics for 1980 through 1985, only Arizona, California, Florida, Louisiana and Texas produce citrus in commercially significant amounts. Florida predominates in the production of citrus in the United States. For example, in 1985, Florida produced 66.4% of the total United States production of citrus fruit, as measured in short tons of production. In that year, no other state produced more than 30% of the total United States production of citrus fruit.

5. A manufacturer of alcoholic beverages could also use sugarcane in the manufacture of alcohol for alcoholic beverages. Only a few states produce sugarcane in commercially significant amounts. According to United States Department of Agriculture statistics for 1980 through 1985, only Florida, Hawaii, Louisiana and Texas

produce sugarcane in commercially significant amounts. Florida leads in the production of sugarcane. For example, in 1985, Florida produced 47% of the total United States production of sugarcane used for sugar, as measured in short tons of production. In that year, no other state produced more than 21% of the total United States production of sugarcane used for sugar.

6. Producers in many states who commercially produce grains and vegetables, which manufacturers can use as a source for alcohol for alcoholic beverages, cannot economically produce citrus and sugarcane in commercially significant amounts. For example, Illinois, Iowa and Nebraska, which are major producers of corn, cannot economically produce citrus or sugarcane; Colorado, Kansas and North Dakota, which are major producers of wheat, cannot economically produce citrus or sugarcane; Montana, South Dakota and Washington, which are major producers of barley, cannot economically produce citrus or sugarcane; Idaho, Maine and Oregon, which are major producers of potatoes, cannot economically produce citrus or sugarcane; and Michigan, Minnesota and Wyoming, which are major producers of sugar beets, cannot economically produce citrus or sugarcane.

7. Producers of grains and vegetables compete with producers of citrus and sugarcane in the sale of raw materials to manufacturers of alcohol for alcoholic beverages. For example, manufacturers of vodka can purchase grains such as corn or vegetables such as potatoes to make the alcohol in vodka or can purchase citrus or sugarcane to make the alcohol in vodka. The manufacturers' choice of raw materials depends upon the respective price of the raw materials and the demand for alcoholic beverages made out of one type of raw material compared to the demand for alcoholic beverages made out of other types of raw materials.

8. Producers of grains and vegetables necessarily suffer an economic discrimination in the competition for sales to manufacturers of alcoholic beverages if any state or country imposes a tax that disadvantages alcoholic beverages made out of grains and vegetables, and advantages alcoholic beverages made out of citrus and sugarcane.

Any such differential in alcohol taxes dramatically affects the demand for the respective alcoholic beverages and consequently affects manufacturers' choices of raw materials. Therefore, for example, since manufacturers of vodka can produce vodka with either corn raw materials or sugarcane raw materials, a producer of corn will lose market share to a producer of sugarcane after a taxing authority intervenes in the market and favors vodka made from sugarcane with a tax advantage.

9. Even when producers of grains and vegetables have price advantages over producers of citrus and sugarcane in the sale of their products to manufacturers, the producers of grains and vegetables suffer an economic discrimination in the competition for sales if any state or country imposes a tax that disadvantages alcoholic beverages made out of grains and vegetables, and advantages alcoholic beverages made out of citrus and sugarcane. Since the price of the producers' raw materials represents a relatively low percentage of the total cost of alcoholic beverages to the consumer, any significant differential in alcohol taxes, which represent a relatively large percentage of the total cost of alcoholic beverages to the consumer, can divest the grain and vegetable producers of a competitive advantage they would otherwise have and confer the competitive advantage on the citrus and sugarcane producers.

10. Producers in many foreign countries can commercially produce grains and vegetables, which manufacturers of alcoholic beverages can use as a source for alcohol for alcoholic beverages. However, many foreign countries that produce grains and vegetables cannot economically produce citrus and sugarcane in commercially significant amounts. For example, Austria, Germany, and Switzerland, which are producers of corn, cannot economically produce citrus or sugarcane; England, Denmark, and Germany which are producers of wheat, cannot economically produce citrus or sugarcane; Finland, Scotland, and Sweden which are producers of barley, cannot economically produce citrus or sugarcane; Ireland, the Netherlands, and Poland, which are producers of potatoes, cannot economically produce citrus or sugarcane; Denmark, Germany, and Sweden, which are producers of sugar beets, cannot economically

produce citrus or sugarcane. Manufacturers of alcoholic beverages in these foreign countries generally use grains and vegetables as a source for alcohol for alcoholic beverages rather than import citrus and sugarcane as a source for alcohol for alcoholic beverages. Many of these manufacturers attempt to export their products to the United States. The demand for their exports depends, in part, upon the prices of their products to United States consumers as compared with the prices of competing products. Since any differential in Florida's taxes on competing products will affect the comparative prices of these products to Florida's consumers, the differential will affect these countries' ability to export their products to the United States.

11. In light of the fact that most states and many countries that produce grains and vegetables used in the manufacture of alcohol for alcoholic beverages do not produce citrus and sugarcane, and the fact that alcoholic beverages made out of grains and vegetables directly compete with alcoholic beverages made out of citrus and sugarcane, Florida's enacting a tax statute that discriminates against alcoholic beverages made out of grains and vegetables and that favors alcoholic beverages made out of citrus and sugarcane will necessarily discriminate against commerce among the states and with foreign countries.

12. Many foreign countries can commercially produce citrus and sugarcane that manufacturers of alcoholic beverages can use as a source for alcohol for alcoholic beverages. However, the majority of these foreign countries have agricultural policies that favor domestic producers through: discriminatory taxes or requirements; agricultural price supports or other economic incentives; or export subsidies. For example, Brazil, Israel, and Italy, which are producers of citrus in commercially significant amounts, and Barbados, Jamaica, and Mexico, which are producers of sugarcane in commercially significant amounts, have policies that favor their domestic producers. Many manufacturers in these countries manufacture the alcohol in alcoholic beverages from their own countries' citrus or sugarcane. Many of these manufacturers attempt to export their products to the United States. The demand for their exports depends, in part, upon the prices of their products to United States consumers as compared with the

prices of competing products. Since any differential in Florida's taxes on competing products will affect the comparative prices of these products to Florida's consumers, the differential will affect these countries' ability to export their products to the United States.

13. In light of the fact that many foreign countries that produce citrus and sugarcane used in the manufacture of alcohol for alcoholic beverages also have agricultural policies that favor domestic producers, and the fact that these foreign countries' alcoholic beverages compete with Florida's alcoholic beverages which are made from the same products, Florida's enacting a tax statute that permits Florida to discriminate against the foreign countries' products and in favor of Florida's products will necessarily permit Florida to discriminate against commerce with foreign countries.

/s/ Anne E. Peck
ANNE E. PECK, Affiant

Sworn to and subscribed before me this 10th day of October, 1986.

/s/ Catherine M. Capote
CATHERINE M. CAPOTE,
Notary Public

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

NO. 86-2997

(Caption omitted in printing)

HAROLD P. OLMO'S AFFIDAVIT IN SUPPORT OF PLAINTIFF
McKESSON CORPORATION'S MOTION FOR PARTIAL SUM-
MARY JUDGMENT AND FOR A PRELIMINARY INJUNCTION

State of CALIFORNIA)
)
County of YOLO)

Before me this day personally appeared Harold P. Olmo who,
being duly sworn, deposes and says:

1. I am a resident of the State of California, am over 21 years of
age, and have personal knowledge of the facts in this affidavit.

2. I am Professor of Viticulture and viticulturist, Emeritus at the
University of California at Davis. I received my bachelor of science in
horticulture from the University of California at Davis and at Berkeley
in 1931 and my doctor of philosophy from the University of California
at Berkeley in 1934. From 1931 until 1983, I held positions at the
College of Agriculture at the University of California at Davis. From
1939 until 1946, I was Assistant Professor of Viticulture and Assistant
Viticulturist at the University of California at Davis; from 1946 until
1952, I was Associate Professor of Viticulture and Associate
Viticulturist; from 1952 until 1977, I was Professor of Viticulture and
Viticulturist; and since 1977, I have been Professor of Viticulture and
Viticulturist, Emeritus. Since 1938, I have served as a consultant for
various governments throughout the world. My principal field of
interest has been the study and improvement of grape varieties, both in
the United States and in Europe, Asia, Africa, the Middle East, Central
America, and South America. I served as President of the American

President of the American Society of Horticultural Science, Western
Region from 1964 until 1965. I have been a Fellow at the American
Association for the Advancement of Science, a Guggenheim Research
Fellow, a Fulbright Research Scholar, a member of the Genetics
Society of America, and U.S. Editor of 'Vitis', International
Viticulture Journal. I have received a Laureate "for outstanding
contributions to world Viticulture" from the Office of International de
la Vigne et du Vin, Lisbon, an Award of Merit from the American
Pomological Society, an Award of merit from the American Wine
Society, and an Award of Merit from the American Society of Enology
and Viticulture.

3. Throughout the world, grape producers generally produce the
Vitis Vinifera species for the manufacture of wine or wine coolers.
Thus, grape producers in France, Italy, Portugal, the Soviet Union,
and Spain and grape producers in Arizona, California, Oregon, and
Washington generally produce the *Vinifera* species for the
manufacture of wine or wine coolers. Grape producers in most of
these areas can produce, but generally do not produce, the species
Vitis rotundifolia, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp.
smalliana, *Vitis shuttleworthii*, *Vitis munsoniana*, and *Vitis berlandieri*
(which are listed in Section 564.06, Florida Statutes (Supp. 1985))
("Florida species").

4. Within the United States, grape producers in a few states,
primarily Florida, Louisiana, and Mississippi, and parts of a few
states, primarily Arkansas, South Carolina, and Texas, cannot
commercially produce the *Vinifera* species for the manufacture of wine
or wine coolers. Grape producers in Florida and these other areas
cannot commercially produce the *Vinifera* species because of the
characteristics of climate and the prevalence of certain diseases,
including Pierce's Disease, that attack the *Vinifera* species. Grape
producers in Florida and these few other areas are able to produce the
Florida species for the manufacture of wines and wine coolers.
Indeed, grape producers in Florida produce only the Florida species
for the manufacture of wine or wine coolers.

5. A manufacturer of wines or wine coolers could use the *Vinifera* species to manufacture the alcoholic content of the beverages. Alternatively, a manufacturer of wines or wine coolers could use the Florida species to manufacture the alcoholic content of the beverages. Historically, the manufacturers of wines and wine coolers generally have used the *Vinifera* species because most consumers prefer the taste of the *Vinifera* species and, therefore, demand *Vinifera* species wines. As a result, grape producers outside of Florida (who grow the *Vinifera* species) have had a competitive advantage over grape producers in Florida (who can grow only the Florida species) in the sale of their products to manufacturers of wines and wine coolers.

/s/ Harold P. Olmo
HAROLD P. OLMO, Affiant

Sworn to and subscribed before me this 9th day of October, 1986.

/s/ Elaine H. Fairley
ELAINE H. FAIRLEY, Notary
Public

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

NO. 86-2997

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S REQUEST FOR THE
COURT TO TAKE JUDICIAL NOTICE OF
OFFICIAL ACTIONS OF
FLORIDA LEGISLATIVE AND
EXECUTIVE DEPARTMENTS

Plaintiff McKesson Corporation ("McKesson"), pursuant to sections 90.202 and 90.203 of the Florida Evidence Code, requests that this Court take judicial notice of the following matters, attached as an Appendix:

1. The attached transcripts of official records of the Florida Legislature regarding consideration of CS/CS/CS/HB 521 and CS/CS/CS/HB 530, along with their respective companion bills, CS/SB 425 and CS/SB 569, constituting legislative history of the Revised Florida Products Exemption. The attached records are described below:

(a) Florida House Committee on Regulated Industries and Licensing meeting of April 23, 1985 regarding consideration of House Bill 521 and 530. APPENDIX, Exhibit A. The official tape is on file at the office of the House Committee on Regulated Industries, Room 412, House Office Bldg., The Capitol.

(b) Florida House Committee on Finance and Taxation meeting of May 8, 1985 regarding consideration of House Bill 521 and 530. APPENDIX, Exhibit B. The official tape is on file at the office of the House Committee on Finance and Taxation, Room 202, House Office Bldg., The Capitol.

(c) Florida House Committee on Appropriations meeting of May 21, 1985 regarding consideration of House Bill 521 and 530. APPENDIX, Exhibit C. The official tape is on file at the office of the House Committee on Appropriations, Room 219, The Capitol.

(d) Florida Senate Commerce Committee meeting of May 9, 1985 regarding consideration of Senate Bill 425 and 569. APPENDIX, Exhibit D. The official tape is on file at the office of the Senate Commerce Committee, Room 410, Senate Office Bldg., The Capitol.

(e) Florida Senate Finance and Taxation Committee meeting of May 14, 1985 regarding consideration of Senate Bill 425 and 569. APPENDIX, Exhibit E. The official tape is on file at the office of the Senate Finance and Taxation Committee, Room 426, Senate Office Bldg., The Capitol.

(f) Florida Senate floor debate on May 30, 1985 regarding consideration of CS/CS/CS/HB 521 and CS/CS/CS/HB 530. APPENDIX, Exhibit F. The official tape is on file at the office of the Senate Secretary, Room 404, The Capitol.

(g) Florida House of Representatives floor debate on May 28, 1985 and May 31, 1985 regarding consideration of CS/CS/CS/HB 521 and CS/CS/CS/HB 530. APPENDIX, Exhibit G. The official tapes are on file at the office of the House Clerk, Room 427, The Capitol.

2. The attached records of actions of executive departments of the State regarding consideration of CS/CS/CS/HB 521 and CS/CS/CS/HB 530, constituting legislative history of the Revised Florida Products Exemption. The attached records are described below:

(a) Legislative Analysis dated June 18, 1985 recommending action by the Governor regarding CS/CS/CS/HB 521; and Legislative Analysis dated June 18, 1985 recommending action by the Governor regarding CS/CS/CS/HB 530. APPENDIX, Exhibit H.

(b) Memorandum dated June 5, 1985 from the Secretary of the Department of Business Regulation directed to the Governor's office discussing CS/CS/CS/HB 521 and recommending action; and Memorandum dated June 5, 1985 from the Secretary of the Department of Business Regulation directed to the Governor's office discussing CS/CS/CS/HB 530 and recommending action. APPENDIX, Exhibit I.

Wherefore, McKesson Corporation respectfully prays that the Court take judicial notice of the aforementioned matters.

Dated: October 17, 1986.

/s/ James M. Ervin, Jr.
JAMES M. ERVIN, JR.

Exhibit A

FLORIDA HOUSE OF REPRESENTATIVES
 Committee on Regulated Industries and Licensing
 April 23, 1985
 (Tape Transcript)

- Chairman: "Yes, by your vote, the Bill passes: Now we'll take up House Bill 521 by Mr. Jones, excise tax on liquor -- whiskey."
- Mr. Jones: "Thank you, Mr. Chairman. I'm not an expert in this field...[Gap in recording]. The legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country. The Hawaiian decision which specified the use of home-grown materials in the product in order to get the exemption has been stricken by the Supreme Court, and the effort here is to correct our statutes in order that we can continue to give these exemptions. I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years. These taxes have not been collected, and I make no effort to change that. If in the eyes of any beholder this legislation expands that exemption, then by all means step forward and give me your amendments which will correct the your amendments which will correct [sic] the bill. Mr. Chairman, in order to move along, Mr. Selph has some amendments I would like to put on. These amendments are offered after

discussions with the Division, the Agency, the department from whence they express the opinion that we were expanding that exemption too much. What we do with these amendments is to restrict the potential of that expansion, and I urge you to pass those, if you would."

- Chairman: "Let's take up the first amendment by Representative Selph. This on Page 3, Line 14, New Subsection 5. Representative Selph?"
- Mr. Selph: "This places the burden of proof to receive the exemption upon the applicant seeking the exemption."
- Chairman: Are you through, Mr. Selph?"
- Mr. Selph: "Yes."
- Chairman: "Anybody like to comment or ask Mr. Selph any question about the amendment? Those in favor of the amendment indicate with an 'aye.'" [sic] [Ayes.] "Opposed? Amendment passes. Next up, file amendment without objection to its passing. Mr. Selph, on Page 2, Line 16, Page 3, Line 13. Mr. Selph to explain."
- Mr. Selph: "Mr. Chairman, this includes other raw products in the definition of products."
- Chairman: "Questions. Those favoring the amendment, indicate with an 'aye.'" [sic]
- Somebody: "What is the number on the top right corner of that?"
- Chairman: "That is Number 3."

- Mr. Selph: "We skipped over Number 2."
- Chairman: "We did? All right, then let's take it up then. Amendment 2. Let's vote on Amendment 3. Those favoring indicate with an 'aye'. Opposed? Now let's go back to Amendment 2, which will give the staff something to do. Page 1, Line 5, after the semi-colon."
- Somebody: "That's title for two."
- Chairman: "That's title for two. Boy, this is the most screwed up thing I have ever seen. Those in favor indicate with an 'aye'. Opposed?"
- Mr. Tucker: "Mr. Chairman, just out of curiosity...[inaudible]."
- Chairman: "That's not the process [laughter]. We'll do that for you, Mr. Tucker; in fact, we'll even let you look at the amendment. I want to tell you, Mr. Jones, this is a screwed-up bunch of amendments as far as how you've numbered them and all that."
- Mr. Jones: "Mr. Chairman, if you would permit me, I'll go through them. I numbered them specifically so that they'd be together."

[GAP]

- Mr. Selph: "... license fee of \$1,500 upon each applicant who wants to get the preference and this is to help the department bear the administrative burden."

- Chairman: "Questions by the committee? Those favoring indicate with an 'aye'. Opposed? Now, we have had two amendments and the title amendments, right? We are now on Amendment 3, which is on Page 2, Line 16, Page 3, Line 13 and we have passed on that earlier. It's all over with."
- Mr. Selph: "No sir."
- Chairman: "It's not all over with. Amendment 4, by Selph, and it's on Page 2, Lines 15, 24, 25 and 26 strike. And on Page 3, Line 12 'honey, guavas, papayas and mangos'."
- Mr. Selph: "We are limiting the number of products that may be used in the manufacture of these spirits. We did this at the request of the Agency. We are limiting the amount of products that can be used in this thing so that it will not get out of hand, and the previous one that dealt with raw materials, deals with raw materials that might have some subsidy applied to it in another state or territory and therefore be eligible; so we are tightening it up on each case, Mr. Chairman."
- Chairman: "Questions by committee? Those favoring the amendment, indicate with an 'aye'. Opposed? The amendment passes. Are there other amendments on the desk? None on the desk. We now have the bill as amended before us, and we have several people who would like to speak for and against the bill. The first one is Mr. Messersmith."
- Mr. Messersmith: "Mr. Chairman, I have two amendments."
- Chairman: "Oh yeah?"

Mr. Messersmith: "But I'm not going to file them; if I ask questions and get answers, I might not file them. On Page 2 and on Page 3, start with Page 2, for example, Line 6 where it says 'in whole or in part'; the part that bothers me is 'in part.' I am concerned that that could have tremendous problems of people producing parts and bringing them in with only a cup or so of sugar-cane by-products in it. I'm wondering if someone is going to speak to that."

Chairman: "You are concerned about brandy. Mr. Jones, do you have somebody who would answer that, or do we have somebody else with a card that would answer -- who would answer that, and if so which card person would it be?"

Mr. Jones: "Mr. LaRosa can do either."

Mr. LaRosa: "Dennis LaRosa, representing Todhunter International. That question has been answered by Court decision; 'whole or in part' was a major question where Florida distillery seeking partial exemption just under the interpretation you are apparently giving it. It was construed in favor of the State, and the phrase, 'whole or in part' in *Jacquinn [sic] v. The Department of Business Regulation*, it was construed that it all qualifies or none of it qualifies. So the language we felt should remain the same to be consistent with that law decision."

Chairman: "Further questions? Feel pretty good about it, Mr. Messersmith? Further questions? We have the bill as amended before us and Mr. Tucker would like to speak as an opponent." [inaudible comments from back of room]

Chairman: "Mr. Dick Burroughs."

Mr. Burroughs: Mr. Chairman and members of the committee, I appreciate the opportunity to be here to speak on this bill. I understand what Representative Jones' motives are, and I have sympathy for those motives, but I don't have sympathy for this particular bill, simply because I feel it would cause confusion and we would be in court. My attorneys have told us that if this bill passes in a restricted enough form to ensure that no products will be brought into Florida to erode the tax base, that it will become unconstitutional, and it will most likely have a suit. In fact, some manufacturers have indicated to the Department that would be the process. I have asked the industry and Mr. Jones to make the amendments that he made to try to narrow down the possibility of products being brought into Florida that could possibly erode the tax base. However, one of the amendments that was made I am not clear on it, so _____ other raw materials; and I do not know exactly what was intended with that amendment and would first prefer some clarification on that particular issue. I do think that this will enhance the potential of opening up the Florida market at a reduced tax rate to manufacturers outside the State of Florida, because it would have to do that in order to comply with the Supreme Court ruling."

Chairman: "Questions to Mr. Burroughs? Mr. Tobiassen?"

Mr. Tobiassen: "No. 1. . . . About five or six years ago Vince _____ and myself sponsored and passed the bills that gave the Florida wine industry the initial tax incentive to do this and the reason

why, we researched and found that California does the same thing, and this is why their wines are so popular -- to try and encourage Florida residents to grow their own grapes and produce their own wine with this tax incentive, which would allow them to compete with states like California. From what I understand, there was a Court ruling saying that you could not do that, and this bill just is an attempt to correct that so we can continue the incentive in the State of Florida. Now is that wrong or what?"

Mr. Burroughs: "The attempt of the bill is so you can continue to give the preferred tax rate to the distillers or manufacturers of wine here in the State of Florida, that is correct. My attorneys and legal staff do not feel that this particular approach, or any approach for that matter that restricts so that no products can come into Florida, would be constitutional under the *Bacchus* decision. And if we do have a suit, which I feel sure we will have, then the courts would be ruling on a Florida case and not on a Hawaiian case."

Mr. Tobiassen: "One other question, Mr. Chairman. Our original bill said that you would get the tax reduction, tax incentive if you produced Florida wine, grown from Florida grapes. Isn't that essentially what this says?"

Mr. Burroughs: "This bill does not say Florida grapes, it says grapes, and lists the different types of grapes on the wine list. On this particular one it doesn't say Florida citrus, they removed the Florida-grown trying to comply with the Florida Supreme Court, or rather the United States Supreme Court decision. This means that they could make the product with other products.

Jacquinn [sic] says that they cannot use other citrus products because they would spoil before they got there. I think they might have tried at one time to use some Brazilian products. But, whether the Texas products from citrus or the California citrus can be brought in here by refrigerated truck or some other means, I would say that they possibly can use it, if it was their desire to do so under this law."

Mr. Tobiassen: "Mr. Chairman, just one more. What would you suggest we do, if we don't do this?"

Mr. Burroughs: "My attorneys are in a quandary, because I asked them if they could draw a bill that would allow this exemption to the Florida agricultural products and help those distilleries and the wineries of Florida, and they did not feel they could draw one and have it stand up constitutionally."

Chairman: "I think, probably, we understand your situation right now. But we do a lot of things up here when a series of attorneys don't agree or disagree. We will just proceed on after we take care of it legislatively."

Mr. Burroughs: "And I'm in sympathy with you on that, I think it's your prerogative to do that."

Chairman: "All right, further questions of Mr. Burroughs? Mr. Selph."

Mr. Selph: Mr. Burroughs, for those of us who believe in states' rights, which I think is most of us -- most of us Americans -- let me ask you, I've got a -- Howard and I talked about this, and it concerns me, a memo dated August 2, 1984 --

which I guess it's not really a Rule under 120, it's kind of a policy statement from the Department and I know it was promulgated before you became Secretary again -- saying that based on *Bacchus* (?), which applied only to the State of Hawaii, that Florida is going to start collecting the tax in full from everybody. Now, my understanding of our departments is that they were there to enforce and implement Florida statutes, and Florida statutes don't condone this policy. And *Bacchus* did not apply to the State of Florida, only to Hawaii. Why did we do it?"

Mr. Burroughs: "I was not Secretary at the time."

Mr. Selph: "Let me ask you another question. Now we are about to pass, I hope, Mr. Jones' states' rights bill here and the one that follows. do you anticipate the Department, under your administration, just to arbitrarily go out and promulgating [sic] another such policy?"

Mr. Burroughs: "Mr. Selph, when I was Secretary, prior to this time, my philosophy has always been on rules and procedures and policies that none be instigated unless they gave clear statutory authority, and I've so instructed the secretaries and my legal staff in that matter."

Mr. Selph: "Thank you, Secretary Burroughs."

Chairman: "Further questions? Representative MacKenzie."

Mrs. MacKenzie: "Have [sic] the minority office gotten more staff, that Mr. Selph has access to have all his reports?" [laughter]

Chairman: "Not near enough, Mrs. MacKenzie."

Mr. Selph: "We just work hard, that's all."

Chairman: "Any other comments, questions? Okay, thank you, sir. Mr. Tucker, you want to wait awhile?" [inaudible comments from back of room]

Chairman: "We could do that. Ed Ashely."

Mr. Ashely: "Thank you, Mr. Chairman. I'm Ed Ashely and I represent the Wine and Spirits Distributors of Florida and we are proposed [sic] to the rewrite of the bill. When this law was enacted, back in the 1960's, it was designed to promote Florida industry and Florida products, and that's what it has done over the years. Now all of a sudden the United States Supreme Court has come along and has said, 'You can't do that, it's unconstitutional.' And it appears that to the sponsors of the present bill before you, the way to overcome that decision, is to open it up to other states and other products grown and produced outside of the State of Florida. So it appears that we have lost the original intent of the legislation back in the 60s, and that is, to promote Florida industry. We are now trying to protect that industry which was created under that legislation. However, in order to do so, we have got to permit the manufacturers in other states to produce the products, ship it into the state, and receive the same preferential tax treatment. The Florida products has grown since 1971 a hundred and forty-eight percent. The non-Florida products, which is the bulk of your revenue, \$6.50 a gallon, has grown 48%. The sales of non-Florida products since 1980 have been absolutely flat, where Florida products

have continued to grow. Now if this pattern continues, obviously your base revenue source from alcoholic beverage, which has always been plentiful, is going to erode. Your reduced rate, which you're considering before you with this bill, will continue to grow, while your full-rate revenue will continue to decline for two reasons: one, because it's doing it all over the United States, and secondly, because of the passage of this bill. And we would ask you to consider that and what it's going to do to your tax base. Thank you."

Chairman:

"Mr. Tobiassen for a series of questions."

Mr. Tobiassen:

"Yes sir, I appreciate that. No. 1. I would like to ask a questions, [sic] I'm apparently a little confused, I though we were passing this bill in order to maintain the competitive edge for Florida, where we would continue to give more of a tax exemption for Florida wines grown or made from grapes grown in the State of Florida. Is this not the --"

Mr. Ashely:

"Representative Tobiassen, this bill does not address wine, it only addresses spirits. You got another bill that will be coming before you that addresses wine. Yes, it will continue to protect that industry. But you've got to keep in mind, according to the lawyers that have drafted this bill, they have come to the conclusion that the only way they can overcome the Court decision -- which I understand in not a real issue in this matter -- is to open it up to the other states who produce similar products from similar grown products, and if they do not have preferential tax in their state, they will under this Bill have the ability to ship their goods in -- i.e.,

Louisiana molasses. Lots of molasses produced in Louisiana. They will be able to ship those goods into the State of Florida, receive the same tax break for similar goods that are produced down in Central Florida."

Chairman:

"Mr. Silver moves that we extend the time of the meeting 'till we complete the agenda. Those favoring indicate with an 'aye'. Okay. Further questions? All right, let's see now. Got Mr. Tucker there. Got Larry Williams, Dennis LaRosa. Well, how 'bout it? Oh, you want to take him first, okay. Now you see, I want to keep a couple proponents in the end, too."

Mr. Williams:

"My name is Larry Williams; I represent the liquor distillers. I know that some of this will be redundant, so in the interests [sic] of saving time, I think the big question here, as Representative Jones pointed out, you are trying to protect Florida products and the only way to get around it is, to try and make it constitutional, is to open it up to out-of-state products, and we've lost the whole original intent of the law that was passed twenty years ago. What you are asked to do with this bill is to make legitimate something that's illegitimate. And you can adopt it, but you still can't make it legitimate. You are being asked to put state revenues in jeopardy by saying, 'well, let both sides take it to court, let them fight it out at the courthouse,' and if we as distillers have to come and sue the state, asking for refunds for our overpayment, which amounts to about \$50,000,000 a year or more as your staff summary shows, then we are being put in an untenable posture of having to sue the state for \$150,000,000 to \$200,000,000. If we are successful, then that means that the State then

comes back and guess who they'll ask to fill the coffers again? It will be us, and our product is the most highly taxed in the nation here in Florida. Our point is, that you will look at the list of products that have been stricken, the great bulk of them have been stricken from the list of those that originally qualified. We were trying to promote agriculture, now we are saying we are not trying to promote all agriculture, just basically one or two that we use in our process. In fact, we want to add one more to it -- sugar-cane by-products. I think we are creating an unfair advantage for some. You mention the number of jobs that they have in the state. I represent Bacardi, and we have 170 in Jacksonville and 150 in Miami and we bottle the product, but we do not have an advantage here. So there are home people who are opposed to this bill, not just those in the state who are supporting it. The third thing is, that it creates a gaping loophole on who actually would qualify under this bill for the tax break. Any time that you give a \$2.45 break, a \$2.35 differential, I can tell you that some of the out-of-state distributors would probably look at it very closely on whether or not we would qualify, and if that were to happen, then your state revenues -- which you can project now as being \$150 or \$160 million a year -- they would be in jeopardy. I just urge you to defeat the bill."

Chairman:

"Any questions to Mr. Williams? Okay, we have a James S. Somebody...I can't read it ... Auburndale, Florida."

Mr. Hammond:

"That's me. I'm James S. Hammond. I'm the general manager of Jacquinn [sic] Florida

Distilling Company. I thank you for the opportunity to speak here this afternoon. Jacquinn [sic] is very interested in supporting these bills, both the wine and distilled spirits bills, the wine bill being discussed now; because we feel that this bill...the legislature of twenty-two years ago started to develop this industry to support agriculture, and we feel that over this particular period of time, and added to in 1979, that they have in fact done that. And a economic impact study, which I'm sure that you have all seen, indicates that this particular process has brought \$128,000,000 worth of impact, and it is true that we have approximately 300 jobs added to the communities. The citrus industry has been hit pretty hard with freezes over the past several years, and now the canker problem. And I submit to you that if we, as winemakers and distillers, cease purchasing their product, then this is going to be a further blow to them, if not a real catastrophe." [sic] The state, as I mentioned a moment ago, has been promoting the grape industry over the past few years, Mr. Tobiassen, and this industry has put several dollars into capital expenditures which are not easily gotten out, especially in the infancy of the stage. And it's going to show I'm sure, in the very near future, and yes you're correct, that California and many, many other States have these incentives; which brings up the point that just a few days ago the State of Mississippi passed a wine bill to do very similar, passed a very similar bill to the one we are suggesting that you do here. This addresses the local economy and so on. The best part, of course, is the fact that because we are in the best industry, and because we are very competitive as a result of an evening of the competition based on the products that we

are in, this allows our product to come in very competitively into the state's market. And the state enjoys, and consumer enjoys, competition; which is not seen in some other states as a result of the lower prices from the outside spirits brought here. Last, I would like to point out that many of the distillers outside are represented by --"

Mr. Silver: "Mr. Chairman. Mr. Chairman -- I'm sorry, I don't mean to -- "

Chairman: "Be still. I'll tell you now. I got to tell you. They think up here they can break in and abuse anybody up here. Now if you were from his district, you wouldn't do this." [Laughter]

Mr. Silver: "Mr. Chairman, my district number is 2. I made that motion to extend the time of the meeting in order to be able to vote on the bill, but we do have a lot of other committee hearings, we also have a very busy schedule today. I'm just wondering if we could wrap this up in some manner, if it could be, because we are running a tight schedule. I can't stay here much longer. I have to be at a deposition."

Mr. Hammond: "Let be close by saying that we very much want to see you support this bill, and thank you very much."

Chairman: "Okay, Mr. Tucker. We want to give everybody an opportunity, but we're going to definitely vote on the bill today, I can tell you."

Mr. Tucker: "Am I coming in there right? I hate it when I can't be heard. Let me tell you I don't have any opposition. My name is Don Tucker. I

represent Southern Wine and Spirits out of Miami, Florida. I have no opposition at all to the bill on wine, and as far as I am concerned it may be constitutionally drawn, it certainly is _____ to this bill. If you think that this bill is going to help the Florida producers, I think you are totally wrong. Now, when you had a bill that did that, which was declared unconstitutional by the United States Supreme Court, even then one of these companies saw fit to go into Santo Domingo and bring in molasses from Santo Domingo and were fined \$100,000 by the Department. Now, you are making it legal for them to do that and because they can get it cheaper there, they're going to get it there. They're business people, and they're not going to do it with Florida products just because you're Florida people. The people could care less about _____ producers. They're like everybody else, they're going to get it as cheap as they can get it, and that's not being mean to them, that's the way it is in the business world. And if they can buy products offshore, which they can get because down in the Dominican Republic a person is paid \$2.00 a day for working, they can produce and deliver over here and these people can distill it cheaper than they can get it delivered from the Florida producer. And they are going to do it. They've proven they'll do it in the past, and now you're making it legal for them to do it, and you're not going to help your Florida producers, and you might as well see that. And as far as the lawsuits are concerned that could be filed -- what happened in Hawaii was not just the revenue those people had paid in, but the revenue that had been unfairly collected from all the other people that had been paid in, but were supposed to be repaid by the State of Hawaii; so

you're really putting a lot of revenue in jeopardy. I don't have anything else to say, but what I am saying is that what you intend to do is well-intentioned, and well motivated, but it's totally wrong, because you're not doing what you think you're doing. And you're going to mess up the Florida farmers, and they're going to lose all the business that you think they are getting through this bill. I'll answer any questions."

Chairman:

"The gentleman from District 1 is recognized."

Mr. Tobiassen:

"I wish somebody would tell me why we are even doing this bill. I was under the understanding that we had to do this to maintain the incentive we have for Florida-grown crops to be used in Florida wines and liquors. Now, that apparently is not what this bill does."

Mr. Tucker:

"This bill, number one, Mr. Tobiassen, does not address itself to wine. In the wine bill that we do have before you, but this is not the one, but you do have one that defines the grapes, as I understand it, in such a way as to make it only apply to those grapes that can be grown in regions like we have in Florida. And that may or may not be constitutional, I don't know, I'm not a constitutional attorney, but what this bill attempts to do is to solve what problem that the Supreme Court found in granting preferential tax to products that were produced only within the confines of the State, to say and make it apply to produces (sic) regardless of where they were produced, of a certain kind, such as sugar-cane and citrus products or goods. And then an attempt is made to say that it won't apply if those states have a preferential tax in their state. Let me ask you this, if we can't have preferential tax

in Florida, how can they have a preferential tax in Louisiana? Or how they can a (sic) preferential tax in Georgia, constitutionally? So what they're saying is, you can buy it anywhere and produce it anywhere, but what they're going to really do is get it offshore because they can get it for next to nothing and our producers are going to go wanting."

Chairman:

"Mr. Tucker, would you answer an unfriendly question, just for the fun of it?"

Mr. Tucker:

"Yes. Even seriously."

Chairman:

"When you were member of this House, do you remember how you voted on this particular issue?"

Mr. Tucker:

"I probably voted for it. Because I was wanting to do what you want to do -- that is, to protect the Florida producer. But if I had thought then that we were voting to allow sugar-cane to come in from other states, or from other countries, and be used and then be given a tax break, I would have voted against it."

Chairman:

"So, that was very unfair of me, but I --"

Mr. Tucker:

"No, it's not. And I don't remember how I voted, but I probably voted for it."

Chairman:

"So in our heart we'll be right, but we may be wrong."

Mr. Tucker:

"Well, this may be true, but you know, that's what a lot of people thought about a certain candidate that ran for president one time. Just because in your heart a lot of people thought he

was right -- but they didn't vote for him and he didn't become president. So what I can suggest that you do is keep it in your heart, the desire to help the farmers in the State of Florida, but realize that in reality what you are doing is hurting them, if you vote for this bill."

Chairman:

"Thank you. Further questions? Okay, now. We tell it like it is up here, and if you don't know us, then you will know it sooner or later, but Dennis LaRosa is the last speaker. -- That's wonderful, Dennis. You may have picked up one on that one." [Laughter] "Mr. Jones?"

Mr. Jones:

Mr. Chairman, again, Mr. Burroughs had a question which we will follow up with him on. It was said that the growth was 148%. I submit to you that this particular industry represents from an early start from of about 3% to what is now 6%, so when you heard 148% increase, it is within a relative span. The people that have spoken opposing this bill now have 94% of the market, and I submit to you that they would like to have the other 6. The cheapest alcohol comes from grain; everything we are talking about here is basically fruit-base, and there is a limitation in that respect. If you are going to operate in Florida, South Texas, Arizona or California you might be able to operate in these areas. If you're going to expand, then your freight becomes a problem and it is no longer competitive with the Florida product and I think I'm safe in saying that. If you get into the problem with Santo Domingo, and \$2.00 a day labor, I would submit to you that on Page 3 of the bill, where it says 'any territories, states, country, subdivisions thereof which provide price support or other economic incentives or advantages,'

eliminate that one as a possibility, because the person that seeks to use that alcohol and get the exemption has to go before the court and get a ruling. These people will have standing and I submit to you that we have made it self-policing so that there will be no expense to the State of Florida. Lawsuits can be argued *ad nauseam*, and I urge you to pass the Bill."

Chairman:

"Any further question to the sponsor? Call the roll on the Bill."

[The roll is called].

Chairman:

"You mean, after all those questions?... By your vote, the bill passes. Take up House Bill 530, Jones, excise tax on wine, same issue."

Mr. Jones:

"Mr. Chairman, you have practically the same amendments which need to be adopted."

Chairman:

"Where are those amendments? Let's take them just as irrationally as we did the others. Amendment No. 1, the same amendment as on the other bill, those favoring the amendment indicate with an 'aye'. Those opposed. Amendment No. 1."

Somebody:

"Idle."

Chairman:

"Idle. Those favoring the amendment, indicate with an 'aye'; opposed. Amendment No. 2. Same amendment as on the other bill, only pertaining to wine."

Somebody:

"It's only \$100 for the wine makers instead of \$1500 for the distillers, Mr. Chairman. Title amendment attached to it."

Chairman: "Okay. Those in favor indicate with an 'aye'. Opposed? Title amendment on that issue. Those favoring, 'aye'; those opposed? Passes. Amendment No. 3 takes out the guavas and stuff. Those in favor indicate with an 'aye'. Opposed? Passes. The bill is before us as amended. Further questions, we only have seven people who wish to be heard on this bill."

Somebody: "Mr. Chairman, can we share the same testimony on this?"

Chairman: "Well, you don't want to show the same testimony? Mr. Burroughs, do you need to be heard on this issue? Same concerns. Mr. LaRosa, you have the same concerns about the passages of the Bill. And a new person, Garry Kechen. In favor of the bill. Further questions? Call the roll on the bill as amended."
[The roll is called].

Chairman: "By your vote, the bill passes. Mr. Selph is recognized."

Mr. Selph: "Mr. Chairman, move the committee substitute on 521 and 530."

Chairman: "Those favoring indicate with an 'aye'. Opposed? Mr. Martinez moves to rise."

End of Tape.

Exhibit B

FLORIDA HOUSE OF REPRESENTATIVES
Committee on Finance & Taxation
May 8, 1985
(Tape Transcript)

Chairman: "Mr. Jones."

Mr. Jones: "Thank you, Mr. Chairman. Are we on the wine bill? [sic]"

Chairman: "On 521."

Mr. Jones: "Which is the liquor bill."

Chairman: "Would you rather take up the wine first?"

Mr. Jones: "No, sir. That's perfectly fine with me, just so I know which bill I'm talking about. This is not my area of expertise, I come --"

Chairman: "That's not what you've been telling me for days, trying to get this bill up."

Mr. Jones: "It's amazing, how we can be educated in a very short time, Mr. Chairman. I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. That is wherein lies my interest. I made the statement in Regulated Industries that I had no intention of

expanding the expense of the State of Florida and I'm convinced that this industry does not want that expanded, and after we made it through Regulated Industries we went to your staff -- and I want to commend Mr. Brown for the help that he has given us in seeing that the amendments in your packet have been drawn up. Now the fiscal note to the bill will be impacted by those amendments -- and would it be permissible, Mr. Chairman, to have Mr. Brown explain to us the results of the fiscal impact of those amendments, please?"

Chairman: "Well, we'll ask the staff to do that."

Mr. Jones: "I'm sorry - I said Brown, forgive me."

Staffperson: "The way the amendments are drawn, I'm not sure, maybe we want to go through the amendment process first."

Mr. Jones: "Well, it's your pleasure. I felt that the members would want to know what the amendments would do before we voted on them."

Chairman: "Yeah, what it basically -- what it would do, it will reduce the fiscal impact, because as I understand the amendments that we have here is, as the sales go up the tax break reduces, so that once they reach a certain level they will no longer have the exemption; it's almost a self-destruct type of approach, so that instead of having this thing go on forever, once they get large enough it will eliminate the exemption."

Mr. Jones: "The Department has expressed a concern, if I may, Mr. Chairman, that we're granting an exemption that's gone on a long time. The

industry is concurring here with this amendment, so that as sales increase the exemption will be reduced."

Chairman: "Let's take up the amendments, Mr. Jones."

Mr. Jones: "All right, sir."

Chairman: "On page 1, line 29, and on page 2, line 25 strike, 'manufactured' and insert 'of which the distilled spirit are manufactured exclusively.' And I think that, in other words, it must be exclusively distilled from Florida products. Any? -- without objection." On page 2, line 1, on page 2, line 28 after the word 'by-products', insert 'except for flavoring extracts.' Okay - this follows the first amendment. Without objection. On page 2, line 7 through 20, insert new language: 'the paragraph B tax rates should not apply to alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries, or to alcoholic beverages manufactured or bottled in states, territories or countries which provide agricultural price supports or other economic incentives or disadvantage exclusively for alcoholic beverages produced within their boundaries.' This, I think, is designed to keep from putting someone in who has price support products, to make them even lower with this tax break, is that not correct."

Mr. Jones: "For those of you not familiar with the issue, the State of Hawaii had a legislation similar to ours. The Supreme Court ruled that they could no longer use that method in interstate commerce."

With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits. Our industry being Florida citrus, molasses and cane molasses. Is that the point, Mr. Chairman?"

Chairman: "I think that's - all right, is there any objection to the amendment? Not - shown adopted." On page 3, strike lines 3 through 22, and insert new language: 'tax rate should not apply to alcoholic beverages' -- I believe this gets into the - I think if you get down to line 16 on this, 'on March 1, 1986, the Department of Business Regulations shall determine for the prior calendar years, compared to the year before, if there has been any increase or decrease in alcoholic beverage gallon sales taxed at paragraph 1b and 2b tax rate. If said gallons is [sic] increased in the prior year, the percentage amount of said increase in excess of 5% shall be the percentage increase in the tax rate.' "

Mr. Jones: "This is the meat and potatoes now. As sales increase, you will see the exemption reduced. Also, on (5) where it says, 'March 1st, '86' and so forth, you are getting into some dates there so that your computation of that will only be done once a year. So this is the meat and potatoes amendment, and I would urge its adoption, Mr. Chairman."

Chairman: "Now, all right, Mr. Jones if you ... let me give you an example, or a for instance... if the tax rate went up, I mean if the sales went up 10% each year, for let's say, two or three years and your tax rate goes up, this amendment -- and

then the sales drop -- this amendment doesn't kick back down, does it?"

Mr. Jones: "I would like Staff to respond to that, he did some real hard work last night on this issue."

Staffperson: "Yes, it does, and on lines 23 and 24 it says that if the gallonage has decreased in the prior year, it will move the tax rate down. It moves them both ways."

Mr. Jones: "Does that answer your question, Mr. Chairman?"

Chairman: "Yes, that answers my question, but that concerns me a great deal. It appears to me that the incentive, as your sales go up and they eventually wipe out tax, I like; but I do not like the fact that because you had a bad year that your tax rate should drop. We don't do that with any other business. I wish my business would drop tax rates if I had a bad year."

Mr. Jones: "Mr. Chairman, if you'll look at the next page, there is [sic] two pages to that particular amendment. The first paragraph it continues there, pick up the next sentence, 'provided however, that the 1b tax rate shall not decrease below 4.15 per gallon nor increase above 6.50 per gallon, and the 2b tax rate shall not decrease below 4.75 per gallon nor increase above 9.53.' So your status quo would be retained. If you go up, you would come to that level, but you would not crash through that floor."

Chairman: "Well, what it does, if they had 2 or 3 good years and then they have a bad year, they are all

of a sudden, they could drop back percentage to the same exemptions, so that it would never -"

Mr. Jones: "Well, we are obviously trying to maintain an industry here, Mr. Chairman; we're not trying to increase the exemption, we're simply maintaining the flow."

Chairman: "All right, any questions on the amendment? Any objections to the amendment? Not shown - adopted. Mr. Jones, I'll be honest with you, I'm going to talk to you between here and the floor about -"

Mr. Jones: "We'll make anyone available you want. Remember my primary statement in the beginning -- if we are increasing the loss to the State, show us how to correct it, and we will be glad to do it."

Chairman: "All right, okay. On page 3, line 25, strike '\$1,500' and insert '\$3,000, (sic) plus travel expenses, Department of Business Regulation to audit the manufacturers' records,' this is the ----"

[GAP FOR REST OF TAPE]

Exhibit C

FLORIDA HOUSE OF REPRESENTATIVES
Committee on Appropriations
May 21, 1985
(Tape Transcript)

Mr. Jones: "Mr. Chairman, in lieu thereof I would urge you to temporarily pass that and take up tab 27 and 28, so we can get these two beverage bills out."

Chairman: "Let's show 15, which is House Bill 1347 TP, and let's go then to -- what did you say, Mr. Jones? -- tab 27 and 28. Take up Committee Substitute for House Bill 521 by Finance and Tax, Regulated Industries, CF Jones and others, on Alcoholic Beverages."

Mr. Jones: "Amendments on the desk, Mr. Chairman. The first bill deals with liquors, the hard stuff. What we're doing here is to retain those 300 jobs that have been developed in Florida as a result of our policies towards Florida products. The continuation of the effort on my part to assure you and the Division and others that we're not expanding this thing, requires this series of amendments which Mr. Weiss has prepared for us from Finance and Tax. We increased the tax by \$.20 a gallon, and we have a semi-annual review rather than an annual review, which will give you the taxes more frequently. We also have a good measure in here that limits the sale of 200 proof alcohol in the State of Florida. Some teenagers are taking advantage of that, producing 'Purple Passion' which has no smell of alcohol to it; and in agreement with the

doctors and M.A.D.D. mothers, we're going to prevent anything over 153 proof. We chose 153, because there is a rum that sells at 151. In addition to that, you have a series of technical [sic], so to speak, in conjunction with these amendments."

Chairman: "Mr. Jones, let's get on the amendments. We got a whole stack of amendments here. The first amendment is on page 1, line 19. This is a lengthy amendment which inserts a new section 1, and it's a two page amendment. Can you explain the amendment, Mr. Jones?"

Mr. Jones: "The language in there, you notice we're striking 'in any state other than Florida.' If we leave that in there we have the constitutional problem that prompted the whole bill in the beginning. We found that our language was in error; we're striking out 'in any state but Florida.'"

Chairman: "Okay. The effect of all this lengthy amendment is just to strike out that phrase. Is there a debate on the amendment? Is there a debate? Is there objection? Without objection; show that amendment adopted. Now, we are on the next amendment on page 2, line 11, strike '4.15' and insert '4.35'. Mr. Jones?"

Mr. Jones: "My numbers don't coincide. I've lost my place there, Mr. Chairman. What is that one again?"

Chairman: "Okay, this is on page 2, line 11."

Mr. Jones: "Sorry about that."

Chairman: "We are going to strike '4.15'."

Mr. Jones: "This is an increase on tax by .20 cents a gallon, Mr. Chairman. It's going to mean more income, some \$400,000."

Chairman: "Just as you explained. Is there a debate? Is there objection? Show that amendment adopted without objection. Now on page 3, line 8, strike '4.75' - '4.95' -- show that adopted without objection. Now the next amendment, a lengthy amendment on page 3, lines 22 through 31, and on page 4, lines 1 through 9, strike all of said lines and insert a lengthy amendment."

Mr. Jones: "We are going from annual review to semiannual review, which means your taxes will be affected twice a year rather than once a year, and it's to our advantage. I move the amendment."

Chairman: "Okay. Is there objection to that amendment? Show the amendment adopted without objection. Now we are on page 4, lines 13 through 17. Strike all of said lines and insert wording, 'non-refundable application fee of \$5,000. The Division shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.'"

Mr. Jones: "It does exactly that, which provides the extra money for the audit necessary and permits the Division to establish by rule the necessary action. Move the amendment, Mr. Chairman."

Chairman: "Is there objection? Without objection; show the amendment adopted. Now on page 4, line 28 -"

Mr. Jones: "That's the 153 proof amendment, I urge you to adopt it by all means."

Chairman: "Okay. Is there objection? Show that adopted without objection. Now, title amendment without objection. Another title amendment without objection; another title amendment without objection; another title amendment without objection; another title amendment without objection; and a final title amendment. Now on the bill as amended. Is there debate or discussion on the bill as Amended? Mr. Hargrid?"

Mr. Hargrid: "Chairman, ladies and gentlemen of the Committee, I just wanted to say this bill is necessary in order to preserve the home state wine industry that we've begin [sic] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill."

Chairman: "Mr. Hargrid, can we show that debate on the next bill instead? Okay - other debate?"

Mr. Jones: "Move the bill, Mr. Chairman."

Chairman: "All right, Mr. Jones moves the bill as a Committee Substitute. Call the roll."

Ms. Morgan: "Representative Burnside --"

Chairman: (gavelling) Ms. Morgan, I'm sorry, before we have the roll call can I ask Mr. Jones one quick question?"

Mr. Jones: "You're recognized."

Chairman: "Why are we taking out honey, fresh fruit, berries and grapes? Did I miss something in all those amendments?"

Mr. Jones: "No sir, the Division felt like we should limit this as much as possible. So what's left is basically citrus and sugar-cane molasses. We took out those others. Frankly, there is not enough of them used to make any difference anyhow, and they wanted to tighten the bill up to that extent. So you have not damaged yourself."

Chairman: "Well, why, the grape people have been talking to me --"

Mr. Jones: "We are on hard. Are you on 521 or 530?"

Chairman: "521."

Mr. Jones: "That's the hard stuff."

Chairman: "You have another bill that takes care of the grape people's problems?"

Mr. Jones: "Yes, sir. The next bill takes care of them."

Chairman: "All right, fine. Okay, anyone else feel compelled? Call the roll."
[The roll is called.]

Chairman: "The bill passes. Now let's take up tab 28, Committee Substitute, for Committee Substitute, for House Bill 530. Now, Mr. Morgan, this is a bill that you and Mr. Hargrid are sponsoring."

Mr. Jones: "This is the wine bill, Mr. Chairman. We are going to make it possible for the retailer to sell

without losing the tax differential. We are going to --"

Chairman: "Basically, Mr. Jones, this is the same bill, in essence, for the wine. Let's go through the amendatory process again first."

Mr. Jones: "All right, sir."

Chairman: "On page 3, line 31 through page 4, line 2, beginning with the word 'shall' on page 3, line 31, and all of said lines 1 and 2 on page 4, strike that language and insert 'all retail sale of wine at licensed wineries shall not be construed as economic incentive or advantage within the meaning of this subsection.' ... Mr. Jones."

Mr. Jones: "It permits the people from getting this exemption to sell at retail in our wineries."

Chairman: "Is there objection to the amendment? Without objection; show that done. Now, we have a lengthy amendment on page 4, lines 3 through 25. Insert the lengthy amendment."

Mr. Jones: "This is a sliding scale so that, if you see a significant increase of sales as a result of this exemption, you will notice that the exemption phases out as your gallonage increases. So it's to protect us, in putting this legislation into effect, that we have this sliding scale and I'd urge adoption."

Chairman: "Okay - any questions? Any objections? Without objection; show that amendment adopted. Now, we are on page 5, lines 17 through 26, and on page 6, line 2. Page 5, lines 17 through 26 strike 'or 11b'; in page 6 line 2,

strike '11b' and insert 'b, c, or d.' Mr. Jones, you are recognized."

Mr. Jones: "Rather than lumping these types of wines together, we have three different categories: 14%, above that, and sparkling; and that's all we are doing here, so that's better identification."

Chairman: "Any objection? Without objection; show that amendment adopted. Now, on page 5, line 19, strike after period lines 19 through 22 and 23, and insert the following language: 'the division shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.'"

Mr. Jones: "This permits the Division to adopt the rules. Move the amendment."

Chairman: "Any objection? Without objection; show that done. Now the technical amendment. Without objection; show that technical amendment adopted. And then a title amendment, show the title amendment adopted without objection, and another title amendment adopted without objection. Now we are on the bill as amended. Is there debate? Mr. Hargrid, you want to debate it again?"

Mr. Hargrid: "Same speech: good bill."

Chairman: "Okay, Mr. Jones moves, Committee Substitute for Committee Substitute for House Bill 530 as Committee Substitute. Call the Roll. Yes, Mr. Jones."

Mr. Jones: "Mr. Chairman, staff tells me that we have a scrivener's error in the amendment on page 4,

lines 3 through 25. We've inserted '225' and it should be '250'."

Staff-person: "Underneath it should be '250'."

Mr. Jones: "A different item there, where it says '3,250,000'? Insert '250'; they simply left it out."

Chairman: "I can't find it."

Mr. Jones: "Second page."

Chairman: "Where it's [sic] says what now?"

Mr. Jones: "3,350,000."

Chairman: ": [sic] Which should be -- "

Mr. Jones: "250."

Chairman: "Is there objection to the technical amendment to the amendment? No objection; we'll show that done. Now, we are on the bill as amended and as debated. Call the roll."
[The roll is called.]

Chairman: "The bill passes."

Nothing else pertaining to the beverage bills is on the tape past this point.

Exhibit D

FLORIDA SENATE
Commerce Committee
May 9, 1985
(Tape Transcript)

Thank you Mr. Chairman. Member of the Committee - Frankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. We have an amendment that has been worked out and already passed through the Regulated Industries Committee in the House and the Finance and Tax Committee and I think it takes care of any concerns you might have."

Chairman: The Bill is now before ... do you want to tell us what it does?

Sen. Crawford: Mr. Chairman, Members of the Committee - this is a tax exemption that was first given in 1963 that basically created an industry in this State - it created one in Polk County that we are very grateful for. It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State. In the amendment we have basically capped the exemption for the fiscal impact to the State so that it in my opinion guarantees that it is no more than the status quo and in fact, at best, maybe in fact raise[sic] some more money for the State.

Chairman: OK, are there any questions? If not, there are two people to speak. Larry Williams speaking for the Distilled Spirits Council.

Larry Williams: Thank you Mr. Chairman and Members of the Committee. I'm Larry Williams representing the liquor distillers. The concept of what you are being asked to do today is worthy because years ago when the exemption was given, it was given under the pretense that what we wanted to do was sell Florida products. We wanted to encourage the use of Florida products in the making of alcoholic beverages and we gave a tax break for that very reason. The only problem is and some of these people are also members of mine, is the Supreme Court of the United States said that you can't do that. That you can't impede the free flow of goods, you can't interfere with the Commerce Clause just because you're trying to use the products of your state. In order to try to circumvent that *Bacchus* decision which clearly makes Florida statute probably unconstitutional, this Bill was drafted to try to get around the arguments so the only way to do that was to strike the language relating to Florida products. So if you look at the Bill we don't speak of Florida products any more. We say products from anywhere. If you make them in Georgia any place that does not have a preferential tax or an incentive in that state would qualify in Florida. So the big question is from an appropriations standpoint, you don't know how - what the impact on Florida dollars are going to be. You don't know how many people are going to qualify for this tax exemption under the bill that you're looking at today. So there may be a short-fall from the revenues there. The big problem for us is that if we had to bring suit

challenging the constitutionality of the statute if this one were passed or if the existing statute stays on the books it puts us in the same situation as with the aviation fuel tax. We have to sue saying okay you have overcollected the tax for the last two or three years and in this case a 30% break would amount to \$50,000,000 a year so we would have to sue saying we won't refund the past three years of taxes and we just don't know what the liability to the State is. The point is in an effort to save a few jobs -- which we don't know for sure that those jobs would be in jeopardy - you being asked to jeopardize millions of state dollars. And I know what we're trying to get to, we're trying the issues you have been asked to evaluate here is illegitimate and the problem we're having is... you can love a child and you can adopt a child. It is very hard though to make it legitimate and that's what this bill tries to do and I urge you vote against it. The concept is noteworthy and there might be ways that you can help Polk County and those distilleries down there but I believe this is not the appropriate way to do it. I urge you to vote against it.

Chairman:

Do other states have an exemption?

Mr. Williams:

Yes. There are several. Since the Supreme Court recent case in Hawaii - a Hawaii case which came out in 1984 immediately when it came out Hawaii went to try to and they went to session the next day to try to change their statute. There are several states that are not required by the legislative process to change them and the Attorney Generals had gone and changed the statutes. There are lawsuits pending in Georgia and many other states on this same

issue. That's our whole point. It's hard from a manufacturer's standpoint when we have to deal with the legislature to come in and be forced to have to take you to court to find out if it ...

Chairman:

[Question inaudible] My understanding is that other states aren't having any problem with this decision because they're not enforcing it.

Mr. Williams:

No sir, that's not correct. Only a week or two ago there was suit brought in Georgia by Heublein - on this very point that I have raised. Kentucky -

[Question]:

Is Georgia continuing in exempting their home-grown products.

Mr. Williams:

What Georgia did, because they were very concerned about this whole issue and the folks favoring it were formidable as they are here and they passed two bills - they passed the preferential bill and they passed the bill similar to Senator Grant's bill to repeal it. They passed both bills and the Governor signed one first and the other second, so that they wouldn't have to come back and do it after the lawsuit - Not that that makes any sense. But to answer your question about what states - Kentucky is a big distilling state and they do not have - a lot of your big distilling states don't have preferential treatment and if there is no preferential treatment in Kentucky, a big distilling state, and they decide to come down and use some of the products or the by-products that are enumerated in the bill and take advantage of Florida's cheaper taxes there is nothing that Florida can do.

[Question] In Kentucky they don't have any preferential ...?

Mr. Williams: It is my understanding in three of the larger distilling states that they don't and that's Kentucky, Indiana, Illinois. [inaudible question] That was my information.

Chairman: The next speaker is Mr. Howard Rasmussen.

Mr. Rasmussen: Mr. Chairman, Members of the Committee, I am Howard Rasmussen, Director of the division of Alcoholic Beverages and Tobacco. We are not unsympathetic to the purpose and intent of this particular bill and the second bill also for consideration of wine. Our concern is, however, that we do not feel the language in each of these bills, but particularly this one on distilled spirits, accomplishes the objective that is set forth. As I said we are not unsympathetic to that objective. We do not think this particular proposed bill accomplishes that. For example, the bill opens the can of worms to a number of products from other states and those products and their manufacturers and distillers could be exempt from Florida taxes at the same rate as people using Florida products and that could open a potential can of worms for us and cause a problem in terms of the decline of state revenue based upon that tax.

For example, one of the unknowns is Bacardi in terms of use of their products for the production of rum. Would this particular piece of legislation provide a tax exemption to Bacardi? Would it provide a tax exemption to other distilleries outside the State of Florida? That's the unknown. We are uncertain and what the statute as Senator McPherson has indicated might be today in Kentucky that could change tomorrow

and then we would have to grant that exemption. We have a concern about the resources necessary to keep track of the exemptions in all fifty states. We have a concern about being able to evaluate the content of the product to make sure that the product complies with the language in this statute. We're concerned about the state resources necessary to conduct the investigation to determine whether they are in compliance with this statute and should we deny an application for an in-state or out-of-state licensee, we're concerned about the impact upon the state to prove our case in either a hearing or in a court of law. We think it's an extremely complicated bill, we lack the kinds of information that is necessary from the other 50 states. That lack would continue should this bill be passed and we think there's [sic] some real problems with the State of Florida. Senator McPherson?

Sen. McPherson: What troubles me is the fact that you're going to testify against the bill in court. If you all hadn't sent our your memo that you were going to start enforcing it and just ignored it, the status quo would have happened. You've caused the situation and now you're testifying against it.

Mr. Rasmussen: Senator McPherson, I didn't cause the problem -- the United States Supreme Court caused it. It was the opinion of the lawyers and the people ... before we sent that memo out, Senator, we contacted the House, we contacted the Senate, we contacted the Governor's Office. That was not done unilaterally by the Division. It was done after contacting other states, it was done after talking with Hawaii and we felt to protect Florida revenue, we had to send that memo out because other wholesalers and

distillers and wineries were threatening us with a lawsuit that could have...

Sen. McPherson: But by your action, if we passed this, you're going to open the door even wider. I find that kind of irresponsible.

Chairman: Any other questions? If not, Senator Crawford, do you want to be heard?

Sen. Crawford: Just very quickly in response, as I mentioned before there's a formula cap in this bill that protects this state against any further loss other than the status quo. As far as enforcement, I'd be glad to work with the Department and make sure they have the adequate resources and I think that you'll find that it is going to be very easy enforcing the status quo and that's what this bill does.

Chairman: Any further discussion on the bill?

Sen. Grant: Mr. Chairman

Chairman: Yes, Senator Grant.

Sen. Grant: I think I get the sense the committee ... I know someone said, I think it was Senator Crawford, it is a very complicated issue [inaudible] I think the bill will have a lot to do with the [inaudible]. I want to point out that there is a bill offered that is in direct competition to Senator Crawford's bill.

Chairman: Any further discussion?

Sen. Deritani[?]: Isn't the bottom line on this that if you want these businesses to move to Florida and we have

a better base here then we want to vote for Senator Crawford's bill. If you want to help the out of state people then you want to vote against this bill and if you want to discourage them from moving to Florida there seems like there should be a lot of people that are on the verge of moving to Florida and if we can just maintain what we have it might bring them in and it seems to me that it's a good bill.

[question re preferential treatment inaudible]

Sen. McPherson: Senator Crawford, doesn't your bill provide for a proviso if another state has the preferential treatment for products that they can't use Florida's preferential treatment ... It's obvious.

Sen. Crawford: That's correct.

Sen. McPherson: And almost every state has this provision so no one [inaudible].

Senator ____: That's not the question I'm asking though. I want to make you understand the question I'm asking. In order to encourage the use of Florida citrus or Florida cane - Florida other home grown products, we gave this exemption and therefore we're getting that revenue. [inaudible] But if this bill passes it would be no prohibition on bringing in products, the same products, such as maybe citrus and sugar cane or whatever else from another state that produces that and the producing party [inaudible] that product.

Chairman: Senator, I think Senator McPherson hit that question fairly squarely that if that company who would like to use other citrus products that may not be produced in Florida they would not get

this exemption if in fact they enjoy an exemption in that state where they're doing it which in that case it's probably true. I think the distinction here, Senator Giardo [?], is the distinction between theory and reality and what this bill does is deal with reality and the reality is we have a way constitutionally of giving support to industry that would locate in this state, would give jobs to this state and would pay taxes in the state and the way we're doing it it would meet the criteria established by the Supreme Court and all the practical effects in reality is going to accomplish exactly what we want. We could argue theory but I think reality is much more important. But most importantly is that reality or theory, we have protected the state's revenues and that's the most important thing and in drafting the bill the way we have we achieve exactly what we want to do and the State remains in good shape and we keep the job. So I think your concern is cured by the way we've drafted this bill.

Sen. McPherson:

One more thing on that. I think Senator Crawford has probably accurately stated the reality of the situation. The reality of this bill is that except for the people that are employed at the distilleries and probably no one else really cares except the owners and the other distributors in the state. The battle of interests, I guess you could make some argument that there are jobs being produced by the distillers. There are also jobs being produced by those that are distributors of the state. So it is that issue. I don't think there'd be a person on this Committee that would have opposed the bill because we were trying to bring jobs to Polk County. The problem with the bill was, or the

law was, that it had the word "Florida" in front of it. It said you can use only Florida made products and the Supreme Court said you can't do that -- this was not constitutional, so you've got to take out that word "Florida". What Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that - the real point is that here we're in jeopardy I think of losing about, I guess it's about 3.9 billion [sic] dollars in revenue to the State. That's what the exemption will do - continue that loss of revenue to the State. There have been threats of suits by the distributors and I think that may or may not be appropriate for this discussion. It probably is not. But just so you know where we are, we're talking about giving a additional 3.9 billion [sic] dollar exemption to two or three particular distillers in this state so that they could continue to operate. And those who have opposed this concept are doing so because they say "Look, we bring jobs into the state too and we supply a lot of money for the state and we aren't being treated fairly." That's what the issue is. So I would say if you wanted to continue the exemption to Senator Crawford's district, which is _____, Senator Crawford that you would give this 3.9 million dollar exemption to that distiller and one other down state. That would be the [sic] for you to do, to vote for this bill. If you all want to do that, you'll have to increase revenues to the State of Florida, the general revenue by 3.9 million dollars [inaudible].

Sen. McPhearson:

Senator Grant, until about 48 hours ago [inaudible] And two or three things did occur.

One, we're not giving something we don't have because we don't have the 3.9 million dollars today. We're not collecting it so we're not giving anything up. It continues the status quo. The thing that cured me was when I found out that they had so artfully drafted this piece of legislation [inaudible] California would and all these people would chip in and take advantage [inaudible]. The way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida. Thank you.

All in favor of the bill, please say "Aye." Aye.
All opposed, "no." No. The bill is passed.

Chairman: We'll take up the next bill. Bill 569. The Committee substitute which is being handed out, is this similar to the House bill?

[Speaker] Yes, Mr. Chairman, I'd like to move committee substitute on that last bill, as well.

Chairman: That motion adopted without objection.

[Speaker] The first bill we had dealt with distilled spirits, this deals with wine and it's exactly the same concept. We're applying the same concept in the current status quo maintaining it for the production of wine.

Chairman: Is there anyone here to give testimony on this bill? Does anyone on the committee want to

Speak on the bill? I think it is the same concept. Senator McPhearson move the bill. All those in favor of the bill say "Aye." Aye. All opposed, "no." Show the bill adopted. That's it, thank you.

EXHIBIT E

FLORIDA SENATE
Finance and Taxation Committee
May 14, 1985
(Tape Transcript)

Discussion of SB 425: Tax exemption on liquor

Chairman,

Robert Crawford: This is a bill that was passed out of the commerce committee last week that in my opinion maintains the status quo on the current exemption that we have. It has created a distillery business in the state and I hope that it's not very controversial.

Sen. Bill Grant: I just wish someone would explain to me the difference between this production of alcohol and the other in the production of ethanol.

Senator Weinstein
(Vice Chairman): It's very simple, Senator Grant. With this kind of alcohol, you get tanked up. The other one you put in your tank.

Senator Grant: What I really was referring to is why did we T.P. one issue related to production of . . .

Chairman: I moved to T.P. because we were bogging down.

Senator Grant . . . alcohol and not on this one.

Chairman: Senator, to respond to your question, as you remember in the Commerce Committee, the

extent of discussion about that and Senator Grant had a different opinion about this, but I thought we got him satisfied back then, but there's a basic distinction in the type of taxation, type of production and currently the reason the exemption for gasohol is currently in effect. What I'm trying to do is keep the exemption for distilleries in effect. And what has happened in the Supreme Court in the *Bacchus* case is that has made a ruling that would tend to jeopardize our existing language, which has been on the books, because of the technical aspects of the *Bacchus* decision. What this attempts to do would be to redraw it, the same basic dollar amount, the same concept, but make it so that it's constitutional. So this question on this issue we have a constitutional problem which we are dealing with and the other question is simply a policy matter.

Senator Grant: Senator, I thought that one bill addressed, that both bills in fact address the same point. I thought it was the production of jobs, the continuation of use of Florida products without saying so because that was a constitutional issue. I think that it applies, and I thought that you and Senator Peterson introduced that bill which would have removed the exemption on gasohol but it's your bill too to continue this exemption. I wonder why we want to continue one exemption and remove another.

Chairman: What Senator Peterson and I were attempting to do on the other bill was to repeal the exemption as it exists, but offer some amendments here to committee that would benefit the Florida producers and that's what we have now. The difference is there's a disagreement on the

Florida producers as how we can proceed with the gasohol. Some of the Florida producers would like to have a production credit at the end of this year. Some would like us simply to go to the reciprocity route. So we have a division among their own people in this state as to how we should proceed on gasohol. As relates to the distillery issue, there is no disagreement and I think that . . . among the people who are benefiting [sic] from it. And so therefore there is that distinction. Certainly there may be some other . . .

Senator Grant: Well you see Senator you see I have some of that gasohol. Probably those creation of those jobs . . . are just as important to me as they are to the people in Polk County or wherever. I think we're going to be inconsistent if we go ahead and pass this bill unless we pass them in tandem.

Sen. McPherson: I think the difference is that by exercising your good bill here will help Florida people, Florida businesses and the exemption of the gasohol the way it was so written was allowing foreign people to take advantage of it. It's the philosophy as far as exemptions is probably the same, but it's who gains is what's important.

SB 569 Wine Exemption Discussion:

Chairman: This bill will take the same concept and it deals with wine. It reinstates the current exemption.

EXHIBIT F

FLORIDA SENATE
Floor Debate
May 30, 1985
(TRANSCRIPT)

President of the
Senate:

Senator Crawford are you ready on your bill?
Senator Crawford do you just want to take up
the House bill?

Crawford:

Yes sir. Yes sir I would.

President:

Which, which House bill do you want?

Crawford:

O.K. let's see . . .

President:

521?

Crawford:

I'm totally buried here, 521 sounds pretty good.

President:

Read the House bill taken up in lieu of the
Senate Bill. Show the necessary motions.

Clerk:

Mr. President, I'm directed to inform the Senate
that the House of Representatives has passed as
amended committee substitute for committee
substitute for committee substitute for House Bill
521 and requests concurrence of the Senate.

President:

Senator Crawford . . .

Clerk:

Committee substitute for House Bill 521, a bill
to be entitled "An Act Relating to Alcoholic
Beverages."

President: Senator Crawford to explain the bill.

Crawford: Mr. President, this is the distilled spirits bill that we are taking care of a constitutional glitch we had in the current law we are continuing the exact same level of exemption for these distilleries and I believe there's an amendment on the desk we need to take up. The House has assured me they'll take the bill. So we need a couple of amendments. Right. Okay thank you.

President: O.K. any, any amendments to the bill?

Clerk: By Senator Crawford on page 6, line 24 insert after calculations lengthy amendment.

Crawford: Mr. President, this is an amendment that puts another cap on top of all the caps we have got so everybody, even to the last second here, they got their last shot to make sure that it's absolutely capped and this does that.

President: Senator Crawford do you want to take that risk? Sending this bill back to the House?

Crawford: Mr. President they have promised me a blood oath that they will take it, so I'm taking them for their word.

President: Mr. Jones' blood?

Crawford: Mr. Jones' blood is at stake.

President: All right. Any objection to the amendment? Without objection. That is 83 bills they're going to take up in the next half an hour, you realize that?

Crawford: That's right.

President: O.K. Read the next amendment.

Clerk: By Senator Crawford, on page 7, line 3 strike new applicant and insert manufacturer or importer applying.

Crawford: O.K. That's the clarification amendment.

President: O.K. Without objection. Any further amendments?

Clerk: No further amendments.

President: Any debate? O.K. Senator Crawford moves that the rules be waived and House Bill 521 be read. Read it the second time.

Clerk: Committee substitute for House Bill 521, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: O.K. Senator Crawford moves that the rules be waived and House Bill 521 be read for a third time by title only and placed on final passage. Without objection read the bill.

Clerk: Committee substitute for House Bill 521, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: The Clerk will unlock the machine and Senators will vote. Have all Senators voted? The Clerk will lock the machine and announce the vote.

Clerk: 30 yeas, 2 nays, Mr. President.

President: The bill passes. Read the next bill.

Clerk: Senate Bill 569, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: O.K., Senator you want to take up House Bill 530?

Crawford: Yes, yes sir.

President: Show the necessary motions to take up House Bill 530 in lieu of Senate Bill 569. Without objection. Read the House Bill.

Clerk: Mr. President, I'm directed to inform the Senate that the House of Representatives has passed as amended committee substitute for House Bill 530 and requests concurrence of the Senate. Committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: Read it again.

Clerk: Committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: Senator Crawford to explain the bill.

Crawford: Mr. President, this is the same concept on the first one. This would apply to wine products, and we have one amendment on the desk.

President: Read, read the amendment.

Clerk: By Senator Crawford, on page 5, line 13, insert after wine, as described in subsection 2.

Crawford: Clarifying amendment.

President: Technical amendment without objection. Any further amendments?

Clerk: No further amendments.

President: Senator Crawford moves that the rules be waived and House Bill 530 be read a third time by title only and placed on final passage. Without objection. Read the bill.

Clerk: Committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages."

President: The Clerk will unlock the machine and Senators will vote.

. . . .

President: Lock the machine.

Clerk: 30 yeas, 2 nays, Mr. President.

President: So the bill passes. Read the next bill.

EXHIBIT G

FLORIDA HOUSE OF REPRESENTATIVES
 Floor Debate
 May 28, 1985
 (TRANSCRIPT)

Clerk: And now for the following title amendment on page 1, line 3.

Speaker: Title amendment without objection, choice of adoption, further amendments on the desk.

Clerk: None on the desk, Mr. Speaker.

Speaker: Representative Jones, for what purpose?

Jones: I'm ready for the two bills that we temporarily passed a while ago, if you could, Mr. Speaker.

Speaker: Would you direct our attention to exactly where they are.

Jones: Page, page 3, the top right hand column, committee subs for House Bill 521 and 530. These are the two Florida Products Bills, dealing with Spirits and Wine.

Speaker: Committee Substitute, uh, excuse me, House Bill 521 has already been read as I understand it for a second time . . . it hasn't been? Alright read it.

Clerk: By the Committee on Appropriations, committee substitute for committee substitute for committee substitute for House Bill 521. A bill to be entitled "An Act Relating to Alcoholic

Beverages," amending section 561.24 Florida Statutes, prohibiting the licensing of any . . .

Speaker: Representative Jones moves that the rules be waived and the committee substitute for House Bill 521 be read a second time. All those in favor of the motion say "Yea," all who oppose say "No." Show it adopted. Read it.

Clerk: By the Committee on Appropriations, committee substitute for committee substitute for committee substitute for House Bill 521. A bill to be entitled "An Act Relating to Alcoholic Beverages," amending section 561.24 Florida Statutes, prohibiting licensing of any manufacturer, rectifier or distiller as a distributor.

Speaker: Representative Jones to explain.

Jones: The State of Florida has granted a benefit to the distillers in Florida using Florida products for many years. The Supreme Court ruled on the issue and we're trying to protect an industry that we developed as a result of our economic development efforts here in Florida. There's 200 to 300 jobs that we're depending upon passage of this bill. Now I think that many of you are familiar with it because it has been through three major committees. I submit to you that this is not my area of expertise. I simply sponsor this legislation because it affects jobs in my district dramatically. You will notice that this is the third committee substitute. In each instance we have done what I have asked staff to do and that is to be sure that we are not expanding the exemption. We're simply trying to protect what was in place prior to this

Supreme Court decision. I want to express my appreciation to Regulated Industries staff, to Finance and Tax staff, Chris Weiss in particular, Mr. Chairman, and also the Appropriations Committee staff for getting this bill in proper form where there is a minimum fiscal impact and we retain Florida jobs. I move the bill. We do have some amendments on the desk, Mr. Speaker.

Speaker: Read the first amendment.

Clerk: Representative C. F. Jones offered the following amendment on page 6 lines 3 through 30, strike all of said lines and insert new subsection 5 and renumber subsequent.

Speaker: Representative Jones.

Jones: This is one more effort to tighten it further so that the schedule of exemptions is reported monthly and the State will know from the number of sales what the rate is and the revenue estimating committee can be kept up to date on a monthly basis. I move the amendment. A series. Move the amendment.

Speaker: Is there debate? Is there discussion? If not, the question recurs on the amendment as offered by Rep. Jones. All in favor say "Aye." Those opposed "No." Amendment passes. Read the next amendment.

Clerk: Representative C. F. Jones offers the following amendment on page 7, line 3, strike after the word, between January 1st and January, and insert July 1st and July. Reading of the amendment Mr. Speaker.

Speaker: Representative Jones.

Jones: This is a date change which puts it in the proper perspective for what we are trying to accomplish with the previous amendments. Move the amendment, Mr. Chairman.

Speaker: Is there debate? Is there debate? If not the question recurs on adoption of the amendment as offered by Rep. Jones. All in favor signify by saying "Aye." Those opposed "Nay." Amendment is adopted. Read the next amendment.

Clerk: Representative C. F. Jones offers the following amendment on page 7, line 4, strike division and insert department, Reading of the amendment . . .

Jones: Technical in nature. We wrote division and should of said department. Move the amendment.

Speaker: Technical amendment. Without objection, show it adopted. Are there further amendments?

Clerk: None on the desk, Mr. Speaker.

Jones: I move you to go to the third reading if we could, Mr. Speaker.

Speaker: Representative Jones moves that the rules be waived and committee substitute for House Bill 521 be read a third time. Is there objection? Without objection, read it.

Clerk: By the committee on appropriations, committee substitute for committee substitute for committee substitute for House Bill 521, a bill to be entitled "An Act Relating to Alcoholic Beverages," amending section 561.24 Florida Statutes. Prohibiting . . .

Speaker: So the question recurs in final passage, committee substitute for House Bill 521. The Clerk will unlock the machine and members will proceed to vote. Have all members voted? Have all members voted? Clerk will lock the machine and announce the vote.

Clerk: 83 Yeas, 3 Nays Mr. Speaker.

Speaker: So the bill passes.

Volusia County bill relating to consolidation: HB 1348

Speaker: Representative Jones, for what purpose?

Jones: I'd like to move committee sub 530, the wine bill, please, Mr. Speaker. We passed the liquor bill, we now need to move the wine bill.

Speaker: Take up, Representative Jones moves the House to take up House Bill 530. RRead it (sic)

Clerk: By the committee on appropriations, committee substitute for committee substitute for committee substitute for House Bill 530, to be entitled "An Act Relating to Alcoholic Beverages," amending sections 564 . . .

Jones: This is the bill I explained earlier, that deals with wine. We passed the hard liquor, I submit we

pass the wine bill. Move it . . . amendments on the desk, Mr. Speaker.

Speaker: Representative Jones first moves the rules be waived, committee substitute for House 530 be read for the second time by title. Without objection. Without objection, read it.

Clerk: By the committee on appropriations, committee substitute for committee substitute for committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages."

Speaker: Representative Jones.

Jones: This is the 12 months reporting amendment. Move it. The same amendment we put on the other bill. Move concurrence with the amendment.

Speaker: Is there discussion, is there debate? There being no debate, the question recurs, the amendment as offered by Representative Jones. All in favor signify by saying "Aye," opposed "No." Amendment passes.

Speaker: Read the amendment.

Clerk: Representative C. F. Jones offers the following amendment on page 4 lines 13 through 31, page 5 lines 1 through 31 . . .

Speaker: So now the question recurs on the amendment as offered by Representative Jones. All those in favor signify by saying "Aye," opposed "No." Now the amendment passes. Read the next amendment.

- Clerk: Representative C. F. Jones offers the following amendment on page 7, line 5 after the word between, strike January 1 and January and insert July 1 . . .
- Speaker: Representative Jones.
- Jones: Annually will apply every six months and that means you'll get your money faster. Pass the amendment, please sir. Same one we had on the other bill.
- Speaker: Is there debate, is there discussion? If not, the question recurs on the adoption of the amendment as offered by Representative Jones. All those in favor signify by saying "Aye," opposed "No."
- Jones: "Aye."
- Speaker: Thank you Mr. Jones. Further amendments?
- Clerk: On the desk, Mr. Speaker.
- Speaker: Read the amendment.
- Clerk: Representative Jones offers the following amendment on page 7, line 9 insert new subsection 13, all revenue collected by above subsections 11 and 12 shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.
- Speaker: Representative Jones.
- Jones: This annual fee will go directly to the Department so that it can take care of the funding

- auditing and other items and reduces the fiscal note further. I move the amendment, Mr. Speaker.
- Speaker: Is there discussion? Is there debate? If not, the question recurs on the adoption of the amendment as offered by Representative Jones. All those in favor signify by saying "Aye," opposed "No." Amendment is adopted. Representative Jones.
- Jones: I don't think there are any other amendments.
- Speaker: Wonderful.
- Jones: May I move that we waive the rules and go to the third reading please.
- Speaker: So you're saying there's a special reason we have to get that down there, O.K. Representative Jones moves that the rules be waived . . .
- Jones: We have a Senate counterpart.
- Speaker: . . . for committee substitute for House Bill 530 be read a third time by title. All those in favor signify by saying "Aye," opposed "No." Read it.
- Clerk: By the committee on appropriations, committee substitute for committee substitute for committee substitute for House Bill 530, a bill to be entitled "An Act Relating to Alcoholic Beverages." Amending . . .
- Speaker: Is there debate? Is there debate? If not, the question recurs on final passage of committee

substitute for House Bill 530. The Clerk will unlock the machine and members will proceed to vote. Have all members voted? Have all members voted? The Clerk will lock the machine and announce the vote.

Clerk:

102 Yeas, 2 Nays, Mr. Speaker.

FLORIDA HOUSE OF REPRESENTATIVES

Floor Debate

May 31, 1985

(TRANSCRIPT)

Mr. Speaker: The bill passes. Read the next message.

Reading Clerk: Also by the Committee on Appropriations, Finance and Taxation, Regulated Industries and Licensing, and Representatives C.F. Jones and Burnsed, Committee Substitute for Committee . . .

Mr. Speaker: Representative Jones moves the rules be waived that we do now take up House Bill 521 instant. All those in favor of the motion say "Yea" opposed "No". Show and adopted. Read it.

Reading Clerk: By the Committees on Appropriations, Finance and Taxation, Regulated Industries and Licensing, and Representatives C.F. Jones and Burnsed, Committee Substitute for Committee Substitute for Committee Substitute for House Bill 521. A bill to be entitled An act relating to alcoholic beverages; amending Section 561 . . .

Mr. Speaker: Representative Jones to explain.

Rep. Jones: Members of the House this is the distilled liquors and 530 following this will be the wine bills for Florida products. I urge you to move it along by concurring in the two Senate amendments that we have on the desk. We will be ready to posture ourselves for passage.

- Mr. Speaker: Representative Jones moves that we do now concur in the two Senate amendments? Is there debate on the two Senate amendments on the motion to concur in the two Senate amendments? Is there debate?
- Rep. C.F. Jones: Mr. Speaker?
- Mr. Speaker: "Yes."
- Rep. C.F. Jones: On the second amendment it will read "manufacturer or importer." We had to write it by hand last night and I'm putting this in so that it will be understood properly. We had to add an "r" to manufacturer and then or importers. The Clerk is familiar to what I'm talking about. We're doing this for clarification. Move the amendments.
- Mr. Speaker: Okay, is there further debate or questions in respect to the motion to concur in the two Senate amendments? Hearing none question recurs on the adoption of the motion. All those in favor say "Yea" and opposed "No." Show it adopted. Now we're on final passage of the bill. The Clerk will unlock the machine, the members will proceed to vote on Committee Substitute for House Bill 521. Have all members voted? Have all members voted? The Clerk will lock the machine and announce the vote.
- Reading Clerk: 107 yeas, 3 nays, Mr. Speaker.
- Mr. Speaker: So the bill passes. Representative Jones moves now rules be waived and that we do take up House Bill 530 instantler. All those in favor of that motion say "Yea," opposed "No." Show it adopted. Read it.

- Reading Clerk: By the Committees on Appropriations, Finance Taxation, Regulated Industries and Licensing, and Representatives C.F. Jones and Dantzler, Committee Substitute for Committee Substitute for Committee Substitute for House Bill 530. A bill to be entitled An act relating to alcoholic beverages; amending sections 564.06, Florida Statutes which exempts from taxation wines manufactured from certain. (sic)
- Mr. Speaker: Representative Jones.
- Rep. C.F. Jones: Mr. Speaker, this is the wine bill. I move you sir, that we concur in the one Senate
- Mr. Speaker: Okay, Representative Jones moves that we do concur in the Senate amendment.
- Rep. C.F. Jones: This is the Florida wine . . . Helen. Bless your heart.
- Mr. Speaker: Is there debate on the motion to concur? Debate or questions in respect to the motion to concur? Hearing none the question recurs on the adoption of the motion. All those in favor say "Yea" all opposed say "No." Show it adopted. Now we're on final passage of Committee Substitute for House Bill 530. The Clerk will unlock the machine and the members will proceed to vote. Have all members voted? Have all members voted? Clerk will lock the machine and announce the vote.
- Reading Clerk: 114 yeas, 1 nay, Mr. Speaker.
- Mr. Speaker: The bill passes.

EXHIBIT H

LEGISLATION ANALYSIS

CS/CS/CS

HB 521 Date Received 6-11-85 Date Due ASAPSB _____ Agency Affected Dept. of Business Regulation

Approp., F&T, Regulated Ind.,

Sponsor(s) Sen. C.F. Jones/ Others Effective Date July 1, 1985

BRIEF:

The bill provides for an exemption or reduced beverage tax rate for liquors and specified alcoholic beverages of which the distilled spirits are manufactured exclusively from citrus byproducts, citrus byproducts(sic), sugarcane, or sugarcane byproducts.

The first category consists of alcoholic beverages except wines containing 14 to 48 percent alcohol by weight and the second category more than 48 percent alcohol.

During July and August of each year the first category beverages are taxed at \$6.50 per gallon and second category beverages at \$9.53 per gallon. Commencing August 20th and each month thereafter the Department of Business Regulation determines the tax rate applicable in the subsequent month as follows: first, the percentage change in the sales of alcoholic beverage in each category is calculated, prior month's gallonage over the same month the prior year. If the gallonage has increased, the tax rate is increased by the percentage increase in gallonage in excess of five percent. If the gallonage has decreased, the tax rate is reduced by the percentage decrease in excess of five percent. However, in no case shall the tax rate for beverages 14 to 48 percent alcohol fall below \$4.35 or rise above \$6.50 per gallon and the tax rate for beverages above 48 percent shall not fall below \$4.95 nor rise above \$9.53 per gallon.

Paragraph (c) of Subsection 565.12(1) is created providing that the exemptions shall not apply to alcoholic beverages manufactured in states or countries which impose discriminatory taxes on beverages manufactured outside their boundaries, or which provide agricultural price supports, other economic incentives, or export subsidies for domestically produced alcoholic beverages.

The bill provides that any manufacturer or importer applying for the reduced special products tax rate shall pay an application fee of \$5,000 each year and a license fee of \$3,000, plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Application and license fee revenues shall go directly to the Department of Business Regulation to administer the provisions of this act. The manufacturer is also required to pay travel expenses of the Department to audit the manufacturer's records.

Section 565.055, Florida Statutes, is created providing that no distilled spirits greater than 153 proof shall be sold, processed or consumed in the state.

Legislative Analysis - CS/CS/CSH3521 - Page Two - June 18, 1985
FISCAL IMPACT: FY 1985-86: \$1.6 mil. FY 1986-87: \$1.2 mil.

POLICY: This bill preserves a long standing tax incentive to produce liquor from Florida citrus and sugar cane by-products. Because of a recent U.S. Supreme Court ruling (*Bacchus v. Diaz* (sic)) the Florida preference provisions of Chapter 565, F.S., as currently written, are probably not constitutional. The matter is currently in litigation at the circuit court level. This bill would preserve this tax preference. The tax loss from this bill is smaller than the loss under existing law. The anticipated losses under current law are \$3.9 million in FY 1985-86 and \$4.0 million 1986-87.

In general it has been the policy of this administration to be skeptical of large tax breaks as a means of promoting economic development. However, the administration has proposed or been party to numerous small tax reductions (\$1 million - \$5 million) in the name of economic development and diversification. Thus, the undeclared but de facto policy appears to be that the investment of small tax breaks for economic development is justifiable. House Bill 521 is consistent with this policy.

RECOMMENDED ACTION:

1. Sign into Law without ceremony _____
2. Sign into Law with ceremony _____
3. Law without Governor's signature XX _____
4. Veto _____

STAFF /s/Edward Montanaro DATE: June 18, 1985
Edward Montanaro

LEGISLATION ANALYSIS

CS/CS/CS

HB 530 Date Received 6-11-85 Date Due ASAP

SB _____ Agency Affected Dept. of Business Regulation

Appropriation, F&T, Regulated Ind.,
Sponsor(s) Sen. C.F. Jones/ Others Effective Date July 1, 1985

BRIEF:

The bill establishes a beverage tax exemption for wines manufactured from citrus fruits and certain species of grapes. However, the tax rate is adjusted monthly based upon the volume sold in the previous month. A sufficiently large volume can cause the tax rate to increase to the general tax rate for that type of product.

Section 1 of the bill amends s. 564.06, F.S., to exempt wine of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* sbsp. *simponi*, *Vitis aestivalis* sbsp. *Smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri* from the standard beverage taxes. Subsection (9) of s. 564.06 is created providing that the exemptions shall not apply to alcoholic beverages manufactured in states or countries which impose discriminatory taxes on beverages manufactured outside their boundaries, or which provide agricultural price supports, other economic incentives, or export subsidies for domestically produced alcoholic beverages.

In lieu of the standard tax rates of \$2.25, (less than 14% alcohol) \$3.00 (greater than 14% alcohol) and \$3.50 (sparkling wines) the bill establishes variable tax rates to be adjusted monthly based upon prior month's sales. During July and August of each year the standard rates prevail. Commencing in August the rate applicable in September is based upon July's sales. For wine less than 14% alcohol, twelve possible rates are established corresponding to different sales volumes. Higher volumes result in higher tax rates. Sales above

gallons trigger the standard rate of \$2.25. Wines over 14% alcohol are adjusted monthly based upon a schedule of two intervals, with a minimum rate of \$1.50 and the standard rate of \$3.00 applicable when sales exceed 12,500 gallons. Sparkling wines are adjusted monthly based upon a five-tiered schedule ranging from a minimum rate of \$1.50 to the maximum rate of \$3.50 triggered by a sales volume exceeding 8,000 gallons. Wine coolers, defined as a combination of carbonated water, flavors, and/or fruit juices containing 1 to 6 percent alcohol, are taxed according to two schedules, one for the higher consumption warm weather period (March through August) and another for winter. The rate is also adjusted monthly and varies from zero to \$2.25.

The bill requires an annual application fee of \$3,000 for each applicant for the special product tax reduction or exemption. Each manufacturer of qualifying special products must pay an annual license fee of \$1,000 plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. The bill provides that the application and license fees shall go directly to Business Regulation to administer the provisions of the act.

Legislative Analysis - CS/CS/CS HB3530 - Page Two - June 18, 1985

FISCAL IMPACT: FY 1985-86: 0.5 million FY 1986-87: 0

POLICY: This bill preserves a tax incentive, proposed by Governor Graham to produce wine from Florida grapes and citrus products. Because of a recent U.S. Supreme Court ruling (*Bacchus v. Diaz* (sic)) the Florida preference provisions of Chapter 564, F.S., as currently written, are probably not constitutional. The matter is currently in litigation at the circuit court level. This bill would preserve this tax preference. The tax loss from this bill is smaller than the loss under existing law. The anticipated losses under current law are \$0.8 million in FY 1985-86 and \$0.9 million in 1986-87.

In general it has been the policy of this administration to be skeptical of large tax breaks as a means of promoting economic development. However, the administration has proposed or been party to numerous small tax reductions (\$1 million - \$5 million) in the name of economic development and diversification. Thus, the undeclared but de facto policy appears to be that the investment of small tax breaks for economic development is justifiable. House Bill 530 is consistent with this policy.

RECOMMENDED ACTION:

- | | |
|-------------------------------------|-----------|
| 1. Sign into Law without ceremony. | _____ |
| 2. Sign into Law with ceremony | _____ |
| 3. Law without Governor's signature | <u>XX</u> |
| 4. Veto | _____ |

STAFF /s/Edward Montanaro DATE: June 18, 1985
Edward Montanaro

EXHIBIT I

STATE OF FLORIDA

DEPARTMENT OF BUSINESS REGULATION
 THE JOHNS BUILDING
 725 SOUTH BRONOUGH STREET
 TALLAHASSEE, FLORIDA 32301

Bob Graham, Governor
 Gary R. Rutledge, Secretary

June 5, 1985

MEMORANDUM

TO: Gene Adams, Legislative Counsel
 FROM: Richard B. Burroughs, Jr., Secretary
 RE: CS / CS / CS 521

The Department has reviewed the above referenced bill and recommends that the Governor veto the legislation.

The legislation replaces what was formally know as the Florida products exemption from alcoholic beverage taxes for beverages manufactured and bottled in Florida from Florida grown products. The constitutionality of the Florida products exemption was cast in doubt by decision of the United States Supreme Court in a case styled *Bacchus v. Dias*, which ruled that states could not constitutionally enact legislation which favorably taxed only domestically produced and bottled alcoholic beverages.

The former Florida products exemption relative to distilled spirits provided a reduced tax rate for beverage distilled and bottled in Florida from Florida products. The above captioned legislation would repeal

the old language and provide in its stead reduced taxation on any alcoholic beverages made from citrus products or sugarcane or sugarcane by-products regardless of where produced. It further provides, however, that such exemption cannot be granted to alcoholic beverages manufactured in any state, territory or country which imposes discriminatory taxes on non-domestically produced alcoholic beverages or which provides agricultural price supports or other economic incentives or advantages exclusively for its domestically produced alcoholic beverages or provides export subsidies for the agricultural products used in making the alcoholic beverages.

Gene Adams
 June 5, 1985
 Page Two

It has been represented that such exeptions insure that no manufacturer outside of Florida can qulaify for the exemption, thereby providing the discriminatory effect to such legislation condemned by the United States Supreme Court in *Bacchus v. Dias*.

The Governor had previously advised representatives of the Florida manufacturers that he would not approve any replacement legislation for the Florida products exemption statute unless it met three criteria, (1) that it would be revenue neutral, (2) that it satisfactorily protected state revenues in the event out-of-state producers successfully challenged the constitutionality of the legislation and claimed entitlement to refunds based on the difference between the full rate of taxation and the reduced rate of taxation, and (3) that it provided adequate funding to the Department of Business Regulation for administration of the revised taxing scheme.

The above captioned bill clearly does not meet the guidelines set by the Governor. No provision whatsoever is made in the statute for protecting or indemnifying the state in the event of a refund action by out-of-state producers. While language is included saying that certain annual fees to be paid by producers qualifying for the exemption will go to the Department for administration of the act, no actual appropriation of money or positions is provided in such bill or in the

appropriations act, thereby seriously impairing the Department's ability to administer the complex provisions of this act. Finally, the act does not appear to be revenue neutral.

The legislation also provides that no distilled spirits greater than 153 proof "shall be sold, *processed* or consumed in the state". Manufacturers and bottlers of distilled spirits in this state, particularly Bacardi, process distilled spirits in excess of 153 proof as a necessary part of making a finished product for sale to consumers that will be well below the 153 proof requirement. While the prohibition against selling or consuming alcoholic beverages in excess of 153 proof may have a valid purpose, the prohibition against "processing" such distilled spirits appears to be solely intended to forbid certain Florida

Gene Adams
June 5, 1985
Page Three

businesses from continuing to pursue the legitimate activity of processing distilled alcoholic beverages into a final product that would be substantially below 153 proof. The act would force such businesses to relocate elsewhere with a corresponding loss of employment and tax revenues to Florida.

Finally, the constitutionality of this legislation remains substantially in doubt. The United States Supreme Court in a case styled *Metropolitan Life Insurance Company v. Ward*, 53 LW 4399 (1985), held that an Alabama gross premiums tax on out-of-state insurance companies which tax was at a greater rate than domestic insurance companies was unconstitutional. In so ruling the Court noted that the legislation did not contain any provision by which the foreign insurers could eliminate (sic) the discriminatory effect between in-state and out-of-state companies.

The above captioned bill suffers from the same infirmity in that it provides a greater tax rate for alcoholic beverage produced out-of-state without the ability for such out-of-state producer to eliminate the disparity in tax. Indeed, since this legislation would deny the

favorable tax rate where another state, territory or country provides export subsidies or economic incentives to agricultural products used in making the alcoholic beverages or where such other jurisdiction's legislature imposes a discriminatory tax, the out-of-state producer would be wholly unable to take any independent action to qualify for the reduced tax.

Out-of-state producers have strongly pushed for full implementation of the *Bacchus* decision in the removal of discriminatory state alcoholic beverage taxing statutes. The Division currently has two refund requests totaling (sic) \$70,000,000.00 because of the discriminatory aspect of the current Florida products tax structure. This legislation will only further aggravate the situation by continuing a discriminatory tax through a costly and administratively complex taxing scheme.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

RBB:HP:js

STATE OF FLORIDA

DEPARTMENT OF BUSINESS REGULATION
THE JOHNS BUILDING
725 SOUTH BRONOUGH STREET
TALLAHASSEE, FLORIDA 32301

Bob Graham, Governor
Gary R. Rutledge, Secretary

June 5, 1985

MEMORANDUM

TO: Gene Adams
FROM: Richard B. Burroughs, Jr., Secretary
RE: CS / CS / CS HB 530

The Department has reviewed the above captioned legislation and would recommend that the Governor veto this bill for the following reasons:

This legislation replaces what was formerly know as the Florida products exemption from alcoholic beverage taxes for wines manufactured and bottled in Florida from Florida grown products. The constitutionality of the Florida products exemption was cast in doubt by decision of the United States Supreme Court in a case styled *Bacchus v. Dias*, which ruled that states could not constitutionally enact legislation which favorably taxed only domestically produced and bottled alcoholic beverages.

The former Florida products exemption relative to wine provided a complete exemption from taxation for such beverages when manufactured and bottled in Florida from Florida products. The above captioned legislation would repeal the old language and provide instead a tax exemption or reduced tax on alcoholic beverages made

citrus, sugarcane (for alcoholic beverage products from 1 to 14 percent alcohol) and from certain defined species of grapes. The legislation further provides, however, that such exemption or reduced tax may not be granted to alcoholic beverages manufactured in any state, territory or country which imposes discriminatory taxes on non-domestically produced alcoholic beverages or which provides agricultural price supports or other economic incentives or advantages exclusively for its domestically produced alcoholic beverages or provides export

Gene Adams
June 5, 1985
Page Two

subsidies for the agricultural products used in making the alcoholic beverages.

It was represented during legislative committee hearings that such exceptions insure that no manufacturer outside of Florida can qualify for the exemption, thereby providing the discriminatory effect to such legislation condemned by the United States Supreme Court in *Bacchus v. Dias*.

The Governor had previously advised representatives of the Florida manufacturers who supported this legislation that he would not approve any replacement legislation for the Florida products exemption statute unless it met three criteria, (1) that it would be revenue neutral, (2) that it satisfactorily protected state revenues in the event out-of-state producers successfully challenged the constitutionality of the legislation and claimed entitlement to refunds based on the difference between the full rate of taxation and the exemption or reduced rate of taxation, and (3) that the legislation provided adequate funding to the Department of Business Regulation for administration of the revised taxing scheme.

The above captioned bill clearly does not meet the guidelines set by the Governor. No provision whatsoever is made in the statute for protecting or indemnifying the state in the event of a refund action by

out-of-state producers. While language is included saying that certain license fees to be paid by benefiting (sic) manufacturers will go to the Department for administration of the act, no actual appropriation of money or positions is provided in such bill or in the appropriations act, thereby seriously impairing the Department's ability to administer the complex and administratively costly provisions of this act. Finally, the act does not appear to be revenue neutral.

The legislation also contains specific provisions concerning the sale of wine coolers. Such non-Florida product is currently taxed at the rate of \$2.25 per gallon. The legislation would substitute a rather complex taxing scheme in which tax rates are computed monthly based on the gallonage

Gene Adams
June 5, 1985
Page Three

sold during the prior month with differing tax tables, one for the prime sales months of March through August and one for the months of September through February. The tax table for the months of March through August provides that if the prior month's sales were between 0 and 250,000 gallons the tax rate will be 40 cents. It is currently predicted by both the Department and industry that between 2 and 2.2 million gallons of wine cooler product will be sold during the coming fiscal year. This would mean an average of approximately 180,000 gallons a month thereby resulting in a 40 cent per gallon tax rate during March through August and \$1.40 tax rate during September through February. This would result in a very substantial revenue loss from the current \$2.25 per gallon tax. Further, sales of this product will most likely result in a decrease in the sale of other alcoholic beverages thereby creating a further but uncertain potential for revenue loss. The Department does not perceive any good and sufficient justification for this tax reduction which will simply result in greater profits and competitive edges to manufacturers and distributors at the expense of state revenues.

Finally, the constitutionality of this legislation remains substantially in doubt. The United States Supreme Court in a case styled *Metropolitan Life Insurance Company v. Ward*, 53 LW 4399 (1985), held that an Alabama gross premiums tax on out-of state insurance companies which tax was at a greater rate than domestic insurance companies was unconstitutional. In so ruling the Court noted that the legislation did not contain any provision by which the foreign insurers could eliminate the discriminatory effect between in-state and out-of-state companies.

The above captioned bill suffers from the same infirmity in that it provides a greater tax rate for alcoholic beverages produced out-of-state without the ability for such out-of-state producer to eliminate the disparity in tax. Indeed, since this legislation would deny the favorable tax rate where another state, territory or country provides export subsidies or economic incentives to agricultural products used in making the alcoholic beverages or where such other jurisdiction's legislature imposes a discriminatory tax, the out-of-state producer would be wholly unable to take any independent action to qualify for the reduced tax.

Gene Adams
June 5, 1985
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Out-of-state producers have strongly pushed for full implementation of the Bacchus decision through the removal of discriminatory state alcoholic beverage taxing statutes. The Division currently has two refund requests totaling \$70,000,000.00 because of the discriminatory aspect of the current Florida products tax structure. This legislation will only further aggravate the situation by continuing a discriminatory tax through a costly and administratively complex taxing scheme.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

RBB:HP:js

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF MCKESSON CORPORATION'S MEMORANDUM
IN SUPPORT OF ITS REQUEST FOR THE COURT TO
TAKE JUDICIAL NOTICE OF OFFICIAL ACTIONS OF
FLORIDA LEGISLATIVE AND EXECUTIVE DEPARTMENTS

Plaintiff McKesson Corporation ("McKesson") has filed motions for partial summary judgment and for a preliminary injunction that challenge the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985), under the federal constitution.

McKesson submits this memorandum in support of its request that this Court, in connection with its consideration of the motions, take judicial notice of records of official actions of legislative and executive departments, which constitute legislative history of the Florida statutes. The United States Supreme Court's pronouncements concerning constitutional challenges to state statutes under the federal constitution's Commerce Clause require this Court to take judicial notice in order to determine the Florida legislature's true purpose in enacting the Florida statutes. Florida law also permits this Court's analysis of the statutes' legislative history.

I. UNDER THE UNITED STATES SUPREME COURT'S
INTERPRETATION OF THE CONSTITUTION'S
COMMERCE CLAUSE, THIS COURT MUST JUDICIALLY
NOTICE THE FLORIDA STATUTES' LEGISLATIVE
HISTORY IN ORDER TO DETERMINE THE STATUTES'
PURPOSE

In numerous decisions concerning constitutional challenges to state statutes under the federal constitution's Commerce Clause, the United States Supreme Court has directed courts to examine challenged statutes for economic protectionism, which is virtually *per se* invalid under the United States Constitution's Commerce Clause. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Thus, in this case, this Court must examine the Florida statutes for either a discriminatory purpose or a discriminatory effect. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *Philadelphia v. New Jersey*, 437 U.S. at 626. The legislative history of the Florida statutes palpably reveals the Florida legislature's protectionist purpose in enacting the tax scheme and is, therefore, critically relevant to this Court's determination of the constitutionality of the challenged law.¹

The United State Supreme Court, in reviewing challenges to state statutes on Commerce Clause grounds, has focused on legislative history to identify the state legislature's intent. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42 n.8 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (testimony before a state Senate committee supported the inference that the legislature had passed a challenged provision in response to the pleas of local businesses seeking protection from competition); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law challenged on Commerce Clause grounds). The Court similarly has focused on legislative history in numerous other cases to find

¹ McKesson is not invoking legislative history to illuminate the statutes' construction, but rather to reveal the legislature's purpose in enacting the challenged statutes. Compare *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So.2d 879, 882 (Fla. 1983).

expressions of legislative intent. See, e.g., *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking [sic] body, minutes of its meetings, or reports" may show discriminatory purpose); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 457-461 (1974) (legislative history provides clear expression of legislative purpose).

Moreover, the Supreme Court in Commerce Clause cases has indicated that courts cannot restrict their review of state statutes to the language of the statute. As the Court stated in *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940), "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." Thus, even if the Florida statutes' language appeared non-discriminatory, this Court would need to explore the legislative history to determine the legislature's true purpose. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977) (citing to legislative history, including a governor's statements, to establish legislative purpose); cf. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977) (referring to legislative history as a source a court should use to determine whether an ostensibly neutral statute is racially discriminatory).

Thus, as a matter of federal constitutional law, this Court must consider the Florida statutes' legislative history to determine the Florida legislature's true purpose in enacting the statutes.

II. UNDER FLORIDA LAW, THIS COURT MAY JUDICIALLY NOTICE THE FLORIDA STATUTES' LEGISLATIVE HISTORY

If the United States Supreme Court's decisions did not require this Court to review the Florida statutes' legislative history, Florida law would still suggest an analysis of the legislative history. Florida courts also have reviewed legislative history to determine legislative purpose. See, e.g., *Florida v. Webb*, 398 So.2d 820, 824 (Fla. 1981) (legislative history must be considered in determining legislative intent); *E.M. Watkins & Co. v. Board of Regents*,

414 So.2d 583, 587 (Fla. Dist. Ct. App. 1982) (legislative committee hearings are "strongly indicative of the legislative intent in enacting [a] statute"); *Speights v. Florida*, 414 So.2d 574, 576 (Fla. Dist. Ct. App. 1982) (tracing the legislative history of an act is relevant in discerning the legislative intent); *Fort Lauderdale v. Taxi, Inc.*, 247 So.2d 467, 469 (Fla. Dist. Ct. App. 1971). Other state courts commonly review legislative history in determining legislative purpose. See, e.g., *Nebraska ex rel. Rogers v. Swanson*, 219 N.W.2d 726, 730 (Neb. 1974) (approving trial judge's examination of the legislative floor debate); *Menzies v. Fisher*, 334 A.2d 452, 455 (Conn. 1973) (reviewing transcript of legislative proceedings).

McKesson has submitted records of official actions of legislative and executive departments of Florida, which constitute legislative history of the Revised Florida Products Exemption. This Court, applying Florida law about the judicial notice of official actions of legislative and executive departments, section 90.202(5), Florida Evidence Code, and following the example of other courts, may properly take judicial notice of this legislative history. For example, in *Jacksonville Electric Authority v. Dept. of Revenue*, 486 So.2d 1350, 1354 (Fla. Dist. Ct. App. 1986), the First District reviewed a legislative committee's discussion of a bill, noting the sponsor's explanation of the bill's purpose, and stated that such official actions of legislative departments of the state may be judicially noticed. See also *Brennan v. Udall*, 251 F.Supp. 12, 24 (D.Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir 1967), *cert. denied*, 389 U.S. 975 (1967); *Menzies v. Fisher*, 334 A.2d 452, 455 (Conn. 1973); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2410 (1971); 31 C.J.S. *Evidence* § 43 (1964). A California appellate court, applying an evidence code section that is almost identical to Florida law,² approved the trial court's judicial notice of legislative

² Section 452(c) of the California Evidence Code authorizes judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States."

Section 90.202(5) of the Florida Evidence Code authorizes judicial notice of "[o]fficial actions of the legislative, executive, and judicial

history, including testimony at legislative hearings and correspondence from the legislative analyst and from a state agency directed to the Governor's office recommending action on a particular bill. *Post v. Prati*, 90 Cal.App.3d 626, 634 (Cal.Ct.App. 1979).³

Indeed, when courts use legislative history to disclose the general purpose of a statute, judges find legislative history to be, in general, a reliable source. See Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv.L.Rev. 370, 379 (1947). When this Court considers McKesson's submission of Florida legislative history, the Court will find the history, in this case, particularly reliable. First, the Florida legislative history focuses primarily on the statements of the sponsors of the legislation, both in the House and in the Senate. When reviewing legislative history, courts emphasize the statements of sponsors. See, e.g., *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951); *Gartner v. Soloner*, 384 F.2d 348, 353 (3rd Cir. 1967). Second, as the legislative history reveals, the sponsors clearly articulate, rather than merely intimate, the purpose of the legislation. Third, the legislators do not advance any competing purposes that might obfuscate the legislative intent. Rather, the legislature's expressed intention to preserve a discriminatory, protectionist preference for Florida commerce constitutes a consistent, dominant theme in deliberations within both legislative and executive departments.

CONCLUSION

Since the United States Supreme Court's decisions require this Court to determine the Florida legislature's purpose in enacting the

departments of the United States and of any state, territory, or jurisdiction of the United States."

The Sponsors' Note following section 90.202 refers several times to the California Evidence Code for comparison

³ Among the legislative history McKesson submits for judicial notice are reports from a legislative analyst and correspondence from the Secretary of a state agency directed to the Governor's office recommending action on the Revised Florida Products Exemption.

Florida statutes in order to resolve McKesson's challenge under the Commerce Clause, and since Florida law, in any event, permits the taking of judicial notice of the legislative history, this Court should grant McKesson's request that the Court take judicial notice of the Florida legislative history for the Florida statutes. This Court will find the Florida legislative history an invaluable guide in determining the Florida legislature's purpose in enacting the statutes.

Dated: October 16, 1986.

/s/ James M. Ervin, Jr.
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and

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(Certificate of service omitted in printing)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

PLAINTIFF MCKESSON CORPORATION'S RESPONSE
TO "DEFENDANT'S FIRST REQUEST FOR ADMISSIONS"

Pursuant to Florida Rule of Civil Procedure 1.370, plaintiff McKesson Corporation ("McKesson") hereby responds to "Defendants' First Request For Admissions" as follows:

FIRST GENERAL OBJECTION

McKesson objects to each of the individual Requests to the extent each may seek information subject to the attorney-client privilege, the work-product doctrine, or both.

SECOND GENERAL OBJECTION

McKesson objects that defendants' purported definition of the term "you" to include McKesson's "employees and authorized agents" makes the individual Requests ambiguous, overly broad, and unduly burdensome.

RESPONSE

REQUEST FOR ADMISSION NO. 1:

That during 1981 you distributed and sold 24,031.94 gallons of liquor which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 565.12, *Fla. Stat.* (1981-1984 Supp.)

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.), for the period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 2:

That during 1982 you distributed and sold 6,956.52 gallons of liquor which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 565.12, *Fla. Stat.* (1981-1984 Supp.)

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence for the period July 1, 1985, to the present.

REQUEST FOR ADMISSION NO. 3:

That during 1981 you distributed and sold 705 gallons of wine which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 564.06, *Fla. Stat.* (1981-1984 Supp.)

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under sections 564.06 and 565.12, *Fla. Stat.* (1985 Supp.), for the period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 4:

That during 1982 you distributed and sold 321.45 gallons of wine which were exempt or partially exempt from Florida's beverage excise tax under the terms of § 564.06, *Fla. Stat.* (1981-1984 Supp.)

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.), for the period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 5:

That during the refund period the taxes for which you seek a refund were included in the sales prices charged by you for wines and liquors sold by you to licensed retail vendors, in addition to all other taxes, costs, and overhead expenses incurred by you with regard to the sale of those products, and in addition to the profit included by you in the sales price of those products.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

McKesson objects that the phrases "included in the sales prices" and "included by you in the sales price" make the Request unintelligible.

McKesson further objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 6:

For each unit of product of wines and liquors sold by you to licensed retail vendors during the refund period the taxes for which

you seek a refund were included in the sales prices charged for each such unit of product and were included in such prices in addition to all other taxes, costs, overhead expenses incurred by you with respect to the sale of such units of product, and in addition to the profit included by you in the sales prices for such units of product.

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

McKesson objects that the phrases "included in the sales prices" and "included by you in the sales price" make the Request unintelligible.

McKesson further objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 7:

For each unit of product of wines and liquors sold by you to licensed retail vendors during the refund period, the taxes for which you seek a refund became part of the debt due from the retail vendors to you and, upon delivery of the products, were collectible as any other debt due to you.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

McKesson objects that the phrases "became part of the debt due" and "were collectible as any other debt due" make the Request unintelligible.

McKesson further objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 7(a):

That you have been fully paid for all units of wine and liquor products which you distributed to your customers during the refund period to and including September 6, 1986.

RESPONSE TO REQUEST NO. 7(a):

Subject to its general objections, McKesson responds to the Request as follows:

McKesson denies the Request.

REQUEST FOR ADMISSION NO. 8:

During the refund period, you were not licensed as a manufacturer of alcoholic beverages in Florida or elsewhere and did not operate as such.

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

McKesson contends that it is entitled to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1981-1984 Supp.), as a distributor of alcoholic beverages. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 9:

During the refund period if a manufacturer's product in which you dealt as a distributor was exempt or partially exempt from the beverage excise tax by reason of § 564.06 or § 565.12, *Fla. Stat.* (1985), such exemption was available for your benefit equally as compared with other distributors who dealt in the same product.

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which did not deal in exempt products during the refund period, admits that, if a manufacturer's product was exempt or partially exempt from the beverage excise tax by reason of § 564.06 or § 565.12, *Fla. Stat.* (1985 Supp.), such exemption was equally available for all distributors that dealt in the same product.

REQUEST FOR ADMISSION NO. 10:

During the refund period, if a manufacturer's product in which you dealt as a distributor was not exempt or partially exempt from the beverage excise tax imposed by § 564.06 or § 565.12, *Fla. Stat.* (1985), all distributors dealing in such product paid the full excise tax imposed.

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which did not deal in exempt products during the refund period, admits that all distributors that did deal in products that were not exempt or partially exempt from the beverage excise tax imposed by § 564.06 or § 565.12, *Fla. Stat.* (1985), had an obligation to pay the full excise tax imposed.

REQUEST FOR ADMISSION NO. 11:

During the refund period, you paid beverage excise taxes on wines and liquors in which you dealt, which products were not exempt or partially exempt from the tax, without protesting to Defendants or the State of Florida the payment of the tax, without voicing question to Defendants or to the State regarding constitutionality of the provisions

of § 564.06 and § 565.12, *Fla. Stat.* (1985), and without advising Defendants or the State that refund of such taxes might be sought based on the alleged unconstitutionality of those statutes.

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which paid beverage excise taxes on wines and liquors in which it dealt during the refund period, which products were not exempt or partially exempt from the tax, denies that it did not protest payment of the tax to Defendants or the State, denies that it did not voice question to Defendants or the State regarding the constitutionality of the provisions of §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.), and denies that it did not advise Defendants or the State that refund of such taxes might be sought based on the alleged unconstitutionality of those statutes.

REQUEST FOR ADMISSION NO. 12:

During the refund period, you were aware that the beverage excise taxes paid on wines and liquors which were not exempt or partially exempt from the tax would be appropriated and expended for governmental operations and programs.

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which is not aware of how the beverage excise taxes which it paid may have been spent, admits that taxes are normally appropriated and expended for governmental operations and purposes.

REQUEST FOR ADMISSION NO. 13:

The taxes paid during the refund period until June 30, 1986 have been appropriated and expended for governmental operations and programs.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson, which is not aware of how the beverage excise taxes which it paid may have been spent, admits that taxes are normally appropriated and expended for governmental operations and purposes.

REQUEST FOR ADMISSION NO. 14:

That during the refund period you were approached by Jacquin-Florida Distilling Co. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson denies that Jacquin-Florida Distilling Co. approached during the refund period, with an offer to distribute its products, any officer or employee of McKesson with authority to accept such an offer.

REQUEST FOR ADMISSION NO. 15:

That you declined the offer referred to in paragraph 14.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

In view of McKesson's response to Request No. 14, Request No. 15 does not apply.

REQUEST FOR ADMISSION NO. 16:

That during the refund period you were approached by Lafayette Vineyards & Winery, Ltd. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson denies that Lafayette Vineyards & Winery, Ltd., approached during the refund period, with an offer to distribute its products, any officer or employee of McKesson with authority to accept such an offer.

REQUEST FOR ADMISSION NO. 17:

That you declined the offer referred to in paragraph 16.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

In view of its response to Request No. 16, Request No. 17 does not apply.

REQUEST FOR ADMISSION NO. 18:

That during the refund period you were approached by Todhunter International, Inc. with an offer to distribute its products which qualified for exemption under §§ 564.06 or 565.12, *Fla. Stat.* (1985) or both.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson denies that Todhunter International, Inc., approached during the refund period, with an offer to distribute its products, any officer or employee of McKesson with authority to accept such an offer.

REQUEST FOR ADMISSION NO. 19:

That you declined the offer referred to in paragraph 18.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

In view of its response to Request No. 18, Request No. 19 does not apply.

REQUEST FOR ADMISSION NO. 20:

That prior to January, 1985, you voluntarily withdrew from the distribution of products which qualified for the exemptions provided in §§ 564.06 and 565.12, *Fla. Stat.* (1981-1984 Supp.).

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.*

(1985 Supp.) for the period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 21:

That you were offered by Todhunter International, Inc., Jacquin-Florida Distilling Co., or Lafayette Vineyards & Winery, Ltd., or all of them, the opportunity to distribute their products which qualified for exemption or partial exemption from the beverage excise tax under §§ 564.06 and 565.12, *Fla. Stat.* (1981-1984 Supp.).

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 22:

That you declined the offer or offers referred to in paragraph 21.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request is

neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

Dated: October 28, 1986.

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and

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S RESPONSE TO
"DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF
DOCUMENTS"

Pursuant to Florida Rule of Civil Procedure 1.350, McKesson Corporation ("McKesson") hereby responds to "Defendants' First Request for Production of Documents" as follows:

FIRST GENERAL OBJECTION

McKesson objects to each of the individual Requests to the extent each may seek information subject to the attorney-client privilege, the work-product doctrine, or both.

SECOND GENERAL OBJECTION

McKesson objects to producing documents at Room 210, Montgomery Building, Kroger Executive Center, Apalachee Parkway, Tallahassee, Florida, as unduly burdensome.

PRODUCTION OF DOCUMENTS

Subject to an agreement of counsel regarding the time, place, manner, and scope of the production, McKesson will produce documents as follows:

REQUEST NO. 1:

All documents identified in response to Defendant's First Interrogatories.

RESPONSE TO REQUEST NO. 1:

McKesson objects that the Request's general reference to "Defendants' First Interrogatories to Plaintiff," which, in turn, generally refers to "Defendants' First Request for Admissions," makes the Request vague, ambiguous, overly broad, and unduly burdensome.

Subject to its general and specific objections, McKesson will produce those documents specifically identified in "Plaintiff McKesson Corp.'s Response to 'Defendants' First Interrogatories to

REQUEST NO. 2:

All memoranda, reports, written recommendations, and written directions to or by the person or persons responsible for pricing decisions with regard to wine and liquor sold by you during the time period January 1, 1977 - January 1, 1978 and January 1, 1983 - January 1, 1984, which documents address the pricing of such wine and liquor sold by you during those time periods.

RESPONSE TO REQUEST NO. 2:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid pursuant to §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request seeks information that is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 3:

All documents which constitute, reflect, or refer to pricing calculations or work sheets with respect to wine and liquors sold by you for the periods of January 1, 1977 - January 1, 1978 and January 1, 1983 - January 1, 1984.

RESPONSE TO REQUEST NO. 3:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid pursuant to §§ 564.06 and 565.12, *Fla. Stat.* (1985 Supp.). Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 4:

All sales invoices for wine and liquor sold by you during the months of May - August, 1977 and during the months of July - October, 1983.

RESPONSE TO REQUEST NO. 4:

McKesson contends that it is entitled in this action to a refund of taxes that McKesson paid under §§ 564.06 and 565.12, *Fla. Stat.* (1985), for the time period July 1, 1985, to the present. Therefore, McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 5:

All memoranda and other documents in your possession, other than those prepared in anticipation of this litigation, which discuss or refer to the constitutionality or unconstitutionality or the legality or illegality of the excise tax imposed on wine and liquor by §§ 564.06 and 565.12, *Fla. Stat.*, and the exemption provided by those statutes to

wine and liquor products produced from Florida-grown products and bottled in Florida.

RESPONSE TO REQUEST NO. 5:

Subject to its general objections, McKesson responds to the Request as follows:

McKesson has no such documents.

REQUEST NO. 6:

The minutes of all meetings of your board of directors from January 1, 1977 to date.

RESPONSE TO REQUEST NO. 6:

McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

McKesson further objects that the Request is overly broad and unduly burdensome.

REQUEST NO. 7:

All reports to stockholders from January 1, 1977 to date.

RESPONSE TO REQUEST NO. 7:

McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

McKesson further objects that the Request is overly broad and unduly burdensome.

REQUEST NO. 8:

All records pertaining to stockholders' meetings held since January 1, 1977.

RESPONSE TO REQUEST NO. 8:

McKesson objects that the Request is neither relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence.

McKesson further objects that the Request is overly broad and unduly burdensome.

REQUEST NO. 9:

All notices of protest delivered to Defendants or to the State of Florida by you on your behalf regarding payment of beverage excise taxes from January 1, 1980 to date.

RESPONSE TO REQUEST NO. 9:

McKesson objects that the Request is overly broad.

Subject to its general and specific objections, McKesson will produce any such documents that relate to the refund period.

REQUEST NO. 10:

All written communication from and after January 1, 1980 between you and Todhunter International, Inc.; Jacquin-Florida Distilling Company or Lafayette Vineyards & Winery, Ltd; or all of them; regarding your distribution or possible distribution of their wines and liquors.

RESPONSE TO REQUEST NO. 10:

McKesson objects that the Request is overly broad.

Subject to its general and specific objections, McKesson will produce any such documents.

Dated: October 28, 1986

Martha W. Barnett
James M. Ervin, Jr.
HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, FL 32302
(904) 224-7000

and

David G. Robertson
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, CA 94104-2105
(415) 434-7000

VERIFICATION

I, JAMES J. GILLEN, declare as follows:

I am Vice-President, Accounting and Controls, of McKesson Wine and Spirits Company, a division of McKesson Corporation ("McKesson"). I am authorized to make this verification on McKesson's behalf.

I have read "Plaintiff McKesson Corporation's Response to Defendant's First Interrogatories to Plaintiff" and am informed and believe that McKesson's answers therein are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October __, 1986, at San Francisco, California.

JAMES J. GILLEN

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 191049

(Caption omitted in printing)

DEFENDANT'S MOTION TO STRIKE PORTIONS
OF AFFIDAVITS OF HAROLD P. OLMO AND ANNE E. PECK

Plaintiff McKesson Corporation having served upon Defendant Division of Alcoholic Beverages and Tobacco, et al. (Defendant) Affidavits of Harold P. Olmo and Anne E. Peck in support of Plaintiff McKesson Corporation's motion for partial summary judgment and for a preliminary injunction pursuant to Rule 1.510 and Rule 1.610, Fla. R. Civ. P., Defendant, by and through the undersigned attorneys, hereby moves this Honorable Court to strike certain portions of said motions herein enumerated, pursuant to Rule 1.510(e), Fla. R. Civ. P.

AFFIDAVIT OF HAROLD P. OLMO

1. Defendant moves to strike all but the first two sentences of paragraph five (5) of the Affidavit of Harold P. Olmo, or in the alternative, any reference to consumer preference and competitive advantage contained within said paragraph.

2. Rule 1.510(e), Fla. R. Civ. P., requires affidavits to "show affirmatively that the affiant is competent to testify to the matters stated herein."

3. The affidavit of Olmo fails to comply with that rule as concerns the above-referenced statement. Said statement is not shown to have been made by an affiant competent to testify to the matters stated therein and should be stricken for its failure in this respect. *Cf., Prohaska v. Bison Co.*, 365 So.2d 794 (Fla. 1st DCA 1978);

Consolidated Mutual Insurance Co. v. Hampton Shops, Inc., 332 So.2d 101, 102-03 (Fla. 3rd DCA 1976).

4. Affiant Olmo's putative [sic] area of expertise would appear to be viticulture and/or horticulture. The affiant recites that the affiant's "principle field of interest has been the study and improvement of grape varieties. . . ."

5. The affidavit of Olmo does not affirmatively show, as is required by rule, affiant to possess sufficient training, competency, experience, or knowledge, so as to qualify said affiant to offer an opinion with regard to the subject of consumer preferences or consumer demand.

6. The affidavit of Olmo does not affirmatively show, as is required by rule, affiant to possess sufficient training, competency, experience, or knowledge, so as to qualify said affiant to offer an opinion with regard to the subject of a product's competitive advantage or lack thereof.

7. The affidavit of Olmo, in particular the passage referenced above, does not set forth facts as would be admissible in evidence as is required by rule. Affiant's testimony and the contentions therein contained are inadmissible insofar as they have absolutely no factual underpinning [sic] and supporting particulars for the assertions therein made. *Samuel v. Magnum Realty Corp.*, 431 So.2d 241 (Fla. 1st DCA 1983).

8. The testimony from the affidavit of Olmo, and the contentions therein contained, are inadmissible as evidence, since as there is no allegation that the factual basis supporting such contentions--if any such support may exist--comprise facts or data of the type reasonably or customarily relied upon by experts in the subject matter. An expert's opinion may not be speculative and must be based upon reliable scientific principles. If it is not, it is inadmissible. *See Delap v. State*, 440 So.2d 1242 (Fla. 1983). An expert's opinion is

inadmissible when based upon insufficient data. *Huskey Industries, Inc. v. Black*, 434 So.2d 988, 992-93 (Fla. 4th DCA 1983).

AFFIDAVIT OF ANNE E. PECK

9. Similar reasoning leads to the conclusion that significant portions of the affidavit of Anne E. Peck should be stricken as not in compliance with Rule 1.510, Fla. R. Civ. P.

10. Peck's affidavit, particularly the paragraphs numbered three (3) through six (6), fail to allege that the facts therein are of the type reasonably relied upon by experts in the subject matter. Furthermore, said paragraphs contain numerous references to nebulous concepts typified by phraseology such as "commercially significant amounts," a "few states," and "major producers." Said paragraphs should therefore be stricken under authority of the rule and case law cited above.

11. Peck's affidavit in paragraph number seven (7) is inadmissible because of a failure to allege that the facts underpinning the opinion expressed therein are of the type customarily relied upon by experts in the subject matter--if any such facts exist. The contentions within said paragraph apparently rely upon the prior assertion, also without expressed factual foundation, that a manufacturer *could* use various products in the manufacture of alcoholic beverages to reach the conclusion that producers of various raw materials compete in the sale of such materials. No particular factual underpinning for such opinion is stated by the affiant. Again with regard to paragraph seven (7), the affidavit fails to affirmatively show that affiant is competent to testify regarding the choice of raw materials made by a manufacturer and the particulars that any one manufacturer or group thereof may consider when making any such choice. The bald assertion that such a choice depends on price and demand *only* is pointed to as an indication of the danger inherent in relying on such conclusory testimony. For these reasons, the paragraph should be stricken under authority of Rule

1.510, Fla. R. Civ. P., *Samuels v. Magnum Realty Corp.*, *supra*, and *Huskey Industries, Inc. v. Black*, *supra*.

12. Similarly, paragraphs eight (8) through eleven (11) of Peck's affidavit fail to allege a basis in fact customarily relied on by experts in the field, insofar as they have any basis in fact whatsoever. Rather they are conclusory allegations going to Plaintiff's ultimate issue without providing any useful information. Again, no particular factual underpinning is suggested for the broad assertions of opinion made by the affiant. Moreover, the affidavit fails to affirmatively show that the affiant is competent to testify regarding whether producers would "necessarily suffer an economic discrimination," or to any "dramatic effects" produced by alcoholic beverages taxes.

13. Paragraph twelve (12) and thirteen (13) do not set forth such facts as would be admissible in evidence. Affiant's testimony is couched in such generalities such as: "the majority of these foreign countries" . . . "have policies that favor their domestic producers" . . . "many manufacturers in these countries."--Again, conclusions are reached by affiant without factual support, let alone such facts as are customarily relied upon by experts in the field. For example, affiant claims in essence that any differential in Florida taxes "will affect these countries' ability to export their products to the United State." This statement represents surmise, is conclusory and lacks factual predicate, as does the entirety of said paragraphs. The affidavit fails to affirmatively show affiant to be competent to testify as to the effect Florida's scheme of taxation may have on interstate and international commerce or the export of products to the United States. For these reasons, paragraphs twelve (12) and thirteen (13) should be stricken under the authority of the above cited rule and case law.

WHEREFORE, Defendant moves this Honorable Court to strike the above referenced portions of the affidavits of Olmo and Peck filed in support of Plaintiff's Motions for Partial Summary Judgment and for a Preliminary Injunction.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
904-487-2142

COUNSEL FOR DEFENDANT

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 0191049

(Caption omitted in printing)

DEFENDANTS' MOTION TO DISMISS

Defendants hereby move to dismiss the Complaint and state:

1. McKesson Corporation (hereinafter "McKesson") fails to allege any facts which state a cause of action with respect to the provisions of §§564.06(9), 565.12(1)(c), (2)(c), *Fla. Stat.* (1985). McKesson alleges only that it is a distributor of domestic and imported alcoholic beverages (Complaint, paragraph 1.) McKesson does not allege that it distributes any alcoholic beverage which has been or would be disqualified from receiving the exemptions provided under ss. 564.06(2)-(4), 565.12(1)(b), (2)(b), *Fla. Stat.* (1985) by reason of the provisions of §§564.06(9), 565.12(1)(c), (2)(c), *Fla. Stat.* (1985).

Further, by reason of such failure, McKesson lacks standing to challenge the provisions of §§564.06(9), 565.12(1)(c), (2)(c), *Fla. Stat.* 1985., since McKesson has not shown that its rights or duties are affected by those subsections. *Eastern Airlines, Inc. v. Department of Revenue*, 455 So.2d 311, 317 (Fla. 1984), *app. dis.*, _____ U.S. _____, 106 S.Ct. 213, _____ L.Ed.2d _____ (1985); *Voce v. State*, 457 So.2d 541 (Fla. 4th DCA 1984).

McKesson has incorporated paragraph 12 of its Complaint, which paragraph challenges the provisions §§564.06(9), 565.12(1)(c), (2)(c), *Fla. Stat.* (1985), into each count of the Complaint.

WHEREFORE, Defendants move to dismiss or to strike paragraph 12 of the Complaint, Count IV, Count VII and to dismiss each remaining count of the Complaint insofar as such count purports to be predicated upon a challenge to §§564.06(a), 565.12(1)(c), (2)(c), *Fla. Stat.* (1985).

2. The Complaint fails to state a cause of action predicated upon the product exemption provisions of §§564.06(2) - (4), 565.12(1)(b), (2)(b), *Fla. Stat.* (1985). It is not alleged, nor are proofs offered by Plaintiff; that sugar cane, citrus, or the grape species enumerated in §564.06(2)-(4), *Fla. Stat.* (1985), are exclusively indigenous to Florida. Indeed, the proof is exactly to the contrary.

It is clearly premissible [sic] for State of Florida to enact laws which have the purpose and effect of promoting the recognition and use of products which Florida produces in the manufacture of alcoholic beverages. *E.G., Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049, 3056 (1984); *Parker v. Brown*, 317 U.S. 341 (1943). The only limitation upon that power of tax classification is that the statutes not discriminate against interstate commerce in promoting that end.

Plaintiff does not allege, nor does it offer proofs, that the agricultural products selected for tax encouragement are grown only in Florida, nor that they are capable of growth only in Florida. Allegations that the products selected for tax encouragement are grown in Florida but are also grown, or capable of growth, in other states and nations do not state a cause of action for unlawful discrimination under the Equal Protection Clause, The Commerce Clause or the Import/Export Clause.

Encouraging the use of such products in the manufacturing of alcoholic beverages certainly has an incidental effect upon interstate commerce. But equally so does the forced stabilization of product prices, which has been upheld against [sic] such attacks. *Parker v. Brown, supra*. Such encouragement has no more effect on interstate commerce than does the use of state revenues to promote citrus, or

sugarcane, or the grape species in question. Such actions are commonplace and certainly not violative of the Commerce Clause, The Equal Protection Clause or the Import/Export Clause.

The statutes clearly do not rise to the level of prohibited regulation of interstate or foreign commerce. If such a proposition were accepted, it would mean that, for instance, Florida would be prohibited from granting favorable tax treatment to lands in Florida devoted primarily to agricultural use, because such tax encouragement would grant some indirect "commercial advantage" to corn, or wheat, or citrus produced in Florida. Indeed, under such an analysis, the provisions of ss. 564.06(2)-(4), 565.12(1)(b), (2)(b), *Fla. Stat.*, are much more clearly permissible than the provisions of §193.461, *Fla. Stat.*, since the former offer favorable tax treatment to beverages made from products which are widely grown and produced outside of Florida.

WHEREFORE, Defendants move to dismiss the Complaint for failure to state a cause of action.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
904/487-2142

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR #. 0191049

(Caption omitted in printing)

DEFENDANTS' FIRST REQUEST TO TAKE JUDICIAL NOTICE

Defendants request the Court to take judicial notice of the following facts, pursuant to s. 90.202(11)(12), Fla. Stat. (1985):

1. That sugarcane is produced in the following States and Nations:

Angola, Cameroon, Chad, Congo, Egypt, Ethiopia [sic], Gabun, Ghana, Guin Republic, Ivory Coast, Kenya, Madagascar, Malawi, Mali, Mauritius, Morocco, Mozambique, Nigeria, Reunion, Rwanda, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Uganda, Upper Volta, Zambia, Zaire, Aimbabwe, Hawaii, Barbados, Belize, Costa Rica, Cuba, Dominican Republic, El Salvador, Puerto Rico, Guadeloupe, Haiti, Honduras, Jamaica, Martinique, Mexico, St. Kitts, Nicaragua, Panama, Trinidad/Tobago, Argentina, Bolivia, Brazil, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, Venezuela, Bangladesh, Burma, China, India, Indonesia, Iran, Iraq, Japan, Malaysia, Nepal, Pakistan, Phillippines [sic], Sri Lanka, Taiwan, Thailand, Vietnam, Australia, Fiji, Papua/New Guinea.

2. That citrus is produced in California, Texas, Florida, Louisiana, and Arizona and in Brazil, Japan, Spain, Italy, Mexico, Israel, India, Argentina and Egypt.

In support of this request, Defendants submit true copies of the Affidavits of Fred Davies and Joseph R. Orsenigo filed in *Tampa Crown Distributors, Inc. Florida Beverage Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation*, Case No. 86-773 (Fla. 2nd Jud. Cir.).

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
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(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR No. 191049

(Caption omitted in printing)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' REQUEST FOR THE COURT TO TAKE
JUDICIAL NOTICE

Defendants, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller submit this Memorandum in Opposition to Plaintiff's request that the Court take judicial notice of the matters contained in Plaintiff's appendix to its Motion.

Federal decisional law does not require this Court to take judicial notice of the matters plaintiff proposes. Legislative intent was not held to be determinative of constitutionality in the cases cited by Plaintiff. Neither does the appendix contain or memorialize official [sic] actions of the legislative or executive departments of this state, matters judicially noticeable under §90.202(5), Fla. Stat. Rather, the appendix contains the impressions of individuals both before and after the fact. Moreover, no statutory ambiguity has arisen, which ambiguity is the sine qua non for resort to extrinsic aids to determine legislative intent.

I. ANALYSIS OF CHALLENGES TO THE CONSTITUTIONALITY OF STATUTES UNDER THE COMMERCE CLAUSE REQUIRES THIS COURT TO EXAMINE ONLY THE STATUTORY LANGUAGE AND ITS PRACTICAL EFFECT.

The clearest expression of legislative intent, or purpose, is found in the words chosen by the legislature to be enacted into law. *E.g., St.*

Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). It is submitted that for Commerce Clause analysis, legislative intent and legislative purpose are synonymous. Plaintiff argues as much in its Memorandum in Support of its Motions for Partial Summary Judgment and for a Preliminary Injunction at page nine, footnote one. This being the case, the above-stated rule that lack of ambiguity precludes resort to extrinsic aids is equally applicable to Florida courts examining Florida statutes for federal Commerce Clause violations.

The federal decisions cited by the Plaintiff do not hold that this Court should judicially notice matters such as are contained in the subject appendix. The case of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), does not stand for the proposition that the United States Supreme Court has mandated this Court, as a matter of federal constitutional law, to judicially [sic] notice transcripts of committee hearings and/or the memoranda of members of the executive branch written after the bill has passed both houses. In fact, the *City of Philadelphia* court held the "dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. *Id.* at 627.

Neither do the other cases cited by Plaintiff mandate any such action. For example, the court in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), rests its decision on the practical effect and actual burden imposed by the statute there in question. The mere fact that certain items of legislative history supportive of the court's conclusion are referenced in its opinion is not surprising [sic]. Nor is it supportive of the broad mandate Plaintiff would seek to have it impose. Similarly, in *Bacchus Imports, Ltd., v. Dias*, 468 U.S. 263 (1984), the court references certain indicia of intent. Nevertheless, the court rested its decision upon statute's discriminatory effect. The mere recitation of legislative history cannot be said to mandate resort to extrinsic aids where a statute speaks plainly on its face. *See also Best of Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). ("In each case it is

our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.")

It is submitted that the cases of *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977), and *National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), are inapplicable to a case involving federal commerce clause analysis. *Arlington Heights* involved a case of racial discrimination with the stated constitutional question being whether an invidious discriminatory purpose is a motivating factor, while *National Railroad* involves a federal court's construction of a federal statute to determine whether it conferred a private right to bring an action in court.

Thus, the federal courts have not mandated that this Court judicially notice the matters contained within the appendix to Plaintiff's Motion. Rather, insofar as legislative intent or purpose is relevant, first resort should be had to the language of the statute. If this language is found to be clear in relation to the facts submitted, which is the case here, the inquiry into intent should find an end with such language.

II. THIS COURT SHOULD NOT JUDICIALLY NOTICE THE DOCUMENTS OFFERED IN PLAINTIFF'S APPENDIX TO ITS MOTION.

It would be helpful before proceeding further to distinguish between the different types of exhibits being offered for judicial notice. They fall into four general categories: (1) transcripts of committee hearings; (2) transcripts of floor debates; (3) a memo entitled "Legislation Analysis", dated June 18, 1985; and (4) a memo on the letterhead of the Department of Business Regulation, dated June 5, 1985.

As so categorized [sic], these materials present at least two broad questions, the answers to which, preclude this Court from taking

judicial notice. The first issue is whether the plain meaning rule precludes resort to extrinsic aids in determining legislative intent. This broad issue subsumes at least one other question: Are the particular documents advanced relevant to a determination of legislative intent? The second issue presented is whether the materials qualify as "official actions" as that term is used in §90.202(5), Fla. Stat.

1. The statute being free from ambiguity given the facts submitted, the plain meaning rule precludes resort to extrinsic aids to determine legislative intent.

A cardinal rule of interpretation is that "courts will look to legislative history only to resolve ambiguity in a statute." *Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So.2d 879, 882 (Fla. 1983). See *City of Tampa v. Thatcher Glass Corporation*, 445 So.2d 578, 579 (Fla. 1984); *Roush v. State*, 413 So.2d 15, 19 (Fla. 1982); *Carson v. Miller*, 370 So.2d 10, 11 (Fla. 1979); *Heredia v. Allstate Insurance Company*, 358 So.2d 1353, 1355 (Fla. 1978); *S.R.G. Corp. v. Department of Revenue*, 365 So.2d 687, 689 (Fla. 1978). Thus, intent is determined in the first instance by the plain meaning of the statute. *St. Petersburg Bank & Trust Company v. Hamm*, 414 So.2d 1071, 1073 (Fla. 1982). Plaintiff does not suggest that any such ambiguity exists. Rather, Plaintiff argues that even absent ambiguity, this Court must delve into the legislative history to somehow ascertain the legislature's "true purposes". However, resort to extrinsic aids is not mandatory and in this case not helpful, given the clearly expressed language found in the subject statutes. Therefore, in keeping with the plain meaning rule, insofar as legislative intent is relevant to this Court's decision, the statute speaks for itself.

The cases cited by Plaintiff are consistent with the plain meaning rule. In *Florida v. Webb*, 398 So.2d 820 (Fla. 1981), the court was resolving confusion as to the applicability of a probable cause requirement in Florida's stop and frisk law. The court's discussion of legislative intent centered on review of the bill title as an aid to

construction and its reference to "the history of its enactment" was no more than a tracing of the journals or the prior enactments in the area. The court in *E.M. Watkins & Company v. Board of Regents*, 414 So.2d 583 (Fla. Dist. Ct. App. 1982), considered varied interpretations of an agency's rule which the agency admitted was inartfully drawn. The contractor interpreted the rule in such a way as to nullify the statute upon which the rule was based, as shown by certain items of legislative history. Similarly, in *Speights v. Florida*, 414 So.2d 574, 576 (Fla. DCA 1982), the court therein stated, "[t]here is an apparent conflict between the two statutes. Application of the rules of statutory construction is necessary to ferret out the answer." Therefore, given the lack of ambiguity in the statutes presently under consideration, the general rule in Florida against resort to extrinsic aids in such situations is fully applicable to the present case.

Even should Plaintiff overcome this general rule, however, the specific materials advanced for judicial notice are not relevant to the present issues of consideration. First, and most obviously, the materials found in what has been categorized above as numbers (3) and (4) are irrelevant to any determination of legislative intent. Despite Plaintiff's characterization on page six, of its Memorandum in Support of its Request, the particular "Legislation Analysis" (number 3) does not appear to have originated within the legislative branch, but rather within the executive branch. It notes "the policy of this administration. . . ." It notes recommended action for the Governor. Importantly, it is dated after passage of the bill by both houses of the legislature. Inasmuch as it is a postenactment statement it is irrelevant to any issue before this Court with regard to legislative purpose or intent. *E.G., Security Feed & Seed Company v. Lee*, 189 So. 869 (Fla. 1939).

Similarly, the document categorized above as number (4), indicating correspondence between members of the executive branch and dated after passage of the bill is irrelevant to any determination of legislative intent. The rule in Florida, which is in accord with the rule

applied in the federal courts, accords the postenactment statements, even of legislators themselves, little or no weight at all. *Compare, Security Feed & Seed Company, supra, with, e.g. Petry v. Block*, 697 F.2d 1169 (D.C. Cir. 1983). The correspondence contained in the Plaintiff's appendix is entitled to no probative weight at all and is in no way useful as an extrinsic aid to determining the legislature's intent.

At the outset of the discussion of the various transcriptions included within the above categories (1) and (2), it must be submitted that the comments of individual legislators are not necessarily indicative of the legislative intent as a whole upon passage of the statutes under attack. The "intent" expressed during a debate may not be the intent at all at another point in time.

[I]t is impossible to determine with certainty [sic] what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof.

United States v. Trans-Missouri Freight Association, 166 U.S. 290, 318 (1897).

2. The material submitted do not qualify as "official actions" as that term is used in the evidence code.

Section 90.202, Fla. Stat., addresses matters which may be judicially noticed, subsection (5) thereof providing in relevant part for the "official actions of the legislative, executive, and judicial departments of . . . any state. . . ." Plaintiff proposes too broad a reading of "official [sic] actions." See *Amos v. Moseley*, 77 So. 791 (Fla. 1940) (executive orders signed by the Governor and attested to by the Secretary of State). Plaintiff's reliance of *Jacksonville Electric Authority v. Department of Revenue*, 486 so.2d 1350 I (Fla. DCA 1986), is misplaced. That case involved construction of a statute which was concededly vague and ambiguous [sic], calling for the use

of extrinsic aids to determine legislative intent. Such is not the case here. Moreover, the court in that case required public records and reports--such as the tapes to which it referred--to be authenticated, thereby precluding judicial notice of same, while recognizing that the official actions to which it previously referred--the journals--may be judicially [sic] noticed. Thus, Florida decisional support the Plaintiff's proposition that the materials which are contained in its Appendix are "official acts" which may be judicially noticed.

CONCLUSION

For the above stated reasons it is respectfully submitted that this Court should not judicially notice the documents contained in Plaintiff's Appendix to its Motion, that such is unnecessary given the clear language of the statute and that such action is contrary to the Florida Rules of Evidence.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050
904-487-2142
COUNSEL FOR DEFENDANTS

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997

(Caption omitted in printing)

DEPOSITION OF STAN F. STARZYK

219 Northwest 12th Avenue
Miami, Florida
Thursday, November 6, 1986
12:10 p.m.

Reported by MARY MEYER, Court Reporter and Notary Public
for the State of Florida at Large, pursuant to Notice of Taking
Deposition filed in the above cause.

APPEARANCES:

MORRISON & FOERSTER, P.A.,
BY: DAVID ROBERTSON, ESQ.,
California Center, 345 California Street,
San Francisco, California 94101-2105
On behalf of the Plaintiff.

STATE OF FLORIDA,
Department of Legal Affairs,
BY: DANIEL C. BROWN,
Assistant Attorney General,
The Capitol,
Tallahassee, Florida 32301
On behalf of the Defendants.

CULPEPPER, PELHAM,
TURNER & MANHEIMER, P.A.,
BY: M. STEPHEN TURNER, ESQ.,
300 East Park Avenue,
Tallahassee, Florida 32302,
On behalf of the Defendant/Intervenors.

ALSO PRESENT:

STEEL, HECTOR & DAVIS, P.A.,
BY: CHERYL BELL, ESQ.,
4000 Southeast Financial Center,
200 South Miami Avenue,
Miami, Florida 33131
On behalf of Brown-Forman
d/b/a California Cooler.

* * * * *

(p.53)

Clearwater – it goes north. It stops somewhere short of the Panhandle. The Panhandle is another distribution area and then Orlando/Jacksonville is the fourth designated area.

[By Mr. Brown:]

Q. Who distributes in that area, Orlando/Jacksonville, for your company?

A. We are not – that is distributed out of Jacksonville? We do not have a house in Jacksonville, a distribution center in Jacksonville.

Q. How do you physically distribute out of Jacksonville now?

A. We don't.

Q. Okay. So you just don't service Orlando or Jacksonville?

A. We do not.

Q. Mr. Starzyk, can I ask you to look again at Mr. Collins' affidavit, specifically paragraph nine that says that, "Since 1985 when sections 564.06 and 565.12 Florida Statutes –

MR. TURNER: 1985:

BY MR. BROWN:

Q. "1985 became effective, McKesson has suffered a significant loss in sales of its products as a result of the competition with other distributors' products that have received the tax exceptions and preferences."

(p.54)

Would you please tell me what magnitude in dollars that significant loss is?

A. I could say it could range into the millions of gross dollars.

Q. It could or it does?

A. I would say it does.

Q. Do you have records that show a loss as a result of competition with the exempt products?

A. I looked over the areas of the decline of some competitive brands that directly relate to those Florida produced products, and it's significant, and I also know what pricing of the Florida produced products versus the pricing of some of the products that I sell is.

You know, it's a vast difference because of pricing, and those commodity-type products, it's very price sensitive. And if you are competitively priced, you sell the products; and if you are not competitively priced, those brands suffer. They don't sell.

Q. Which brands are you referring to specifically?

A. I'm talking in general of vodka and gins. I'm talking about Bacardi Rum, Castillo Rum and really for a matter of fact all – so many distilled products that compete against the products that are produced from (p.55) citrus or cane.

Q. So, are you saying that the loss referred to in that paragraph, whatever the amount may be, is a result of competition between products you distribute such as in the vodka, gin and rum area?

A. And wine and coolers.

Q. And the competition between those products and vodka and gin made from sugar cane -

MR. ROBERTSON: I think you are misstating the testimony. He said in their competition with all the Florida exempt products.

MR. BROWN: I'm just trying to get some more specific idea of this competition that's resulting in your loss.

BY MR. BROWN:

Q. Specifically, what products are you distributing that are in direct competition with other products that are causing the loss?

A. All the products that I sell that are competing with Florida produced products suffer to some degree because of the price differential.

Q. Let's take them one at time (sic).
Okay. You distribute vodka; right?

A. Right.

(p.56)

Q. You distribute vodka made from potatoes?

A. Grain.

Q. Grain.
What brands are those?

A. Volga Vodka, Absolut Vodka, Crystal Palace Vodka, Taaka Vodka.

Q. Okay. Now, what products are those vodkas in competition with that has caused you to lose money? What vodka products? Start there.

MR. ROBERTSON: I think you are misstating his testimony. His testimony is not that vodka competes against vodka. It is that -

MR. BROWN: Let the witness tell me what his testimony is.

MR. ROBERTSON: I don't want you to mislead him in terms of mischaracterizing his testimony.

MR. TURNER: He misstated? He's just asking him a question.

MR. ROBERTSON: If I could state my objection. His testimony is that spirits compete against spirits and that vodka competes not only against vodka but other spirits.

BY MR. BROWN:

Q. Well, that may be the case but obviously your (p. 57) spirits compete against spirits and so your vodkas complete (sic) against other vodkas; is that right?

A. Sure.

MR. ROBERTSON: As well as other items.

MR. BROWN: We can get to those. Now I'm talking about vodka.

BY MR. BROWN:

Q. The vodka you distribute that you just listed for us that are made out of grain, what other vodkas do they complete (sic) with that are made out of sugar cane or some other product?

A. All the vodkas and all the spirits.

Q. Are there vodkas that are made from sugar cane?

A. Sugar cane or citrus.

Q. Okay. What are those?

A. You want me to specifically name those particular products?

Q. Are the vodkas that are made from citrus or cane in competition with the vodkas made from grain that you distribute?

A. Yes.

Q. Okay. What are those vodkas?

A. What are those vodkas?

Q. Are those vodkas made out of gin or citrus (p.58) that are in competition with the vodkas that you distribute?

MR. TURNER: Cane or citrus.

MR. ROBERTSON: In addition to the ones spelled out in the affidavit?

MR. BROWN: Let me try it again.

BY MR. BROWN:

Q. You distribute Volga and Absolut, Taaka and Crystal Palace vodkas; is that correct?

A. Right.

MR. ROBERTSON: I don't believe that Mr. Starzyk meant that to be an all inclusive list.

MR. BROWN: I didn't ask if it was.

BY MR. BROWN:

Q. You do distribute at least those four and it's your testimony that those four vodkas are made from grain?

A. Yes, sir.

Q. It is also your testimony, is it not, that other vodka is made not from grain but from citrus or sugar cane; is that right?

A. There are other vodkas made from citrus and sugar cane, you're right.

Q. And are those other vodkas made from citrus and sugar cane distributed in Florida by someone?

(p.59)

A. They are distributed here by someone.

Q. In Florida?

A. Yes.

Q. So, those other vodkas according to your testimony then are in competition with the vodkas you have listed to me that you distribute?

A. Yes.

Q. What are the names of those vodkas that you are in competition with?

A. There are several private labels, citrus products. One is Saxony, Paradise, Whitehall. Those are some of them.

Q. Are you refreshing your memory at the present moment, sir, by looking at a document?

A. Yes, I did.

Q. What document is that?

MR. ROBERTSON: That's Mr. Collins' affidavit.

BY MR. BROWN:

Q. So, is it your testimony now that your memory is refreshed and that your vodkas also complete (sic) against Five Flags Vodka?

A. Sure.

Q. Now, where are Saxony, Paradise, Whitehall and Five Flags Vodka made?

A. I believe they are all produced in Florida.

(p.60)

Q. Do you know what they are made from?

A. It's my belief they are either made from citrus or cane.

Q. Do you know whether that citrus or cane is made in Florida or whether it's imported from somewhere else?

A. I really don't know. I would assume it's in Florida.

Q. Do you distribute any vodka product that is made from sugar cane?

A. To the best of my knowledge, no.

Q. Are there vodka products besides the ones that are listed in this affidavit available for distribution that are made from sugar cane?

MR. ROBERTSON: Object to the use of the words, "Available for distribution."

MR. BROWN: I'll rephrase it.

BY MR. BROWN:

Q. If you wanted to distribute a cane product, a cane vodka product, and you didn't want to distribute one of those, would there be others on the market that you could distribute?

A. I really don't know.

Q. Do you distribute any product such as gin that's made from sugar cane or citrus?

(p.61)

A. I do not.

Q. Has the company ever done so?

A. To the best of my knowledge, no.

Q. Does (sic) vodka and gin from your experience or your company's experience compete against rum?

A. I believe they do sometimes.

Q. Do vodka and gin products compete against bourbon?

A. I believe they do also.

Q. Do vodka and gin products and rum products compete against rye whiskey?

A. I believe all products compete against each other at sometime or another.

Q. To the extent then that someone sells a bottle of rum, they may be displacing a bottle of bourbon that someone might have bought instead?

A. It's a possibility.

Q. Well, sir, you distribute vodka; right?

A. Uh-huh.

Q. You also distribute bourbon; is that right?

A. Uh-huh.

MR. ROBERTSON: You have to answer audibly.

THE WITNESS: Yes.

BY MR. BROWN:

Q. You also distribute corn based liquor (p.62) products: do you not?

A. Yes.

Q. Barley based liquor products?

A. Yes.

Q. Do you distribute rum?

A. Yes.

Q. So, in a sense you're competing against yourself when you distribute those things; are you not?

A. I compete in the marketplace with several different brands for all the consumers.

Q. You sell a bottle of rum that may displace a bottle of bourbon that you might have sold; isn't that true?

A. It's a possibility.

Q. You said that since the effective date of the product exemptions in 1985, at least Mr. Collins says this in his affidavit, McKesson has suffered a significant loss in sales of its products.

How much of a loss in sales?

MR. ROBERTSON: Objection. The question has been asked and answered.

BY MR. BROWN:

Q. How much of a loss in sales?

MR. ROBERTSON: You have previously given an estimate of millions of dollars in gross sales. (p.63) Can you refine that further at this point?

THE WITNESS: No. I really can't.

BY MR. BROWN:

Q. How do you measure that? How do you know it's a loss?

A. Estimated -

MR. ROBERTSON: Objection, asked and answered.

MR. BROWN: The question has not been asked in the past.

MR. ROBERTSON: It has been asked and answered. the witness testified that he could observe over time the sales of his products against other price competition in the market and see a declining sales for certain products.

MR. BROWN: Are you instructing the witness not to answer the question?

MR. ROBERTSON: No, I'll let him answer it.

MR. BROWN: Could you read the question back, please?

(Thereupon, the above-referred to question was read back by the reporter as above recorded.)

A. Estimated case volumes.

BY MR. BROWN:

Q. I'm sorry?

(p.64)

A. Estimated case volumes versus price for -

Q. You are speaking so low I couldn't hear what you said.

A. I said estimation of sales of different products that I represent that are price competitive.

Q. Have you had a net loss in your sales volume since July 1 of 1985?

MR. ROBERTSON: McKesson overall or in Florida or -

BY MR. BROWN:

Q. McKesson in Florida.

Have you lost net sales volume in Florida since July 1, 1985?

MR. ROBERTSON: Have their net sales declined, is that what you are asking?

MR. BROWN: Let me rephrase the question.

BY MR. BROWN:

Q. In other words, you were selling during the years preceding July 1, 1985.

You know what the sales were in Florida; is that right?

A. Well, let me just break that down a little bit and see if this is the answer that you are looking for.

Last year since September 1, October 1, there have been a decrease of case sales. The net sales in (p.65) dollars may be up, but the case sales are down.

Q. Let me take you back because I want to make sure I understand what you are saying.

You know how many cases of wine and distilled spirits McKesson sold in the fiscal year, let's say, for the 12 month period between July 1, 1984 and July 1, 1985; do you not?

A. Yes, I do.

Q. And you know the total number of cases of wine and distilled spirits that McKesson sold between July 1, 1985 and July 1, 1986; do you not?

A. Yes.

MR. ROBERTSON: In rough numbers?

THE WITNESS: Right.

BY MR. BROWN:

Q. How many cases did you sell between July 1, '84 and July 1, '85?

A. Off the top of my head I can't give you that answer. I can give you some reference. Spirits case sales are down.

Q. So, is it your testimony that you have sold less cases in the period between July 1, 1985 and July 1, 1986 of spirits than you did between '84 and '85?

A. Give that to me one more time so I can get it clear in my head.

(p.66)

Q. Why don't I just draw you a little diagram here and maybe I can make myself a little more clear.

This is a time line. On this end is 7-1-84. In the middle is 7-1-85. On this end is 7-1-86, a two year period; right?

Now, this piece here between 7-1-84 and 7-1-85, comparing that to the piece between 7-1-85 and 7-1-86, did you sell more or less cases of liquor from 7-1-85 to 7-1-86 than you did in this period back here?

A. I'm going to have to refrain because I don't know exactly, because there was one major -- one major distinction in that time period. That was the Federal excise tax, because that could really distort the numbers.

Q. I don't care what is distorted, sir.

What I'm asking you is if you know if between 7-1-84 and 7-1-85 you sold the same, less than or more than you sold in the same period a year later.

A. I don't know. I can't tell you.

Q. Do you know whether you sold more wine by the case between 7-1-85 and 7-1-86 than you did between 7-1-84 and 7-1-85?

A. I sold more wine.

Q. By case?

A. Yes, sir.

(p.67)

Q. So, you didn't lose any money from your previous sales experience the year before than in 1985; did you?

MR. ROBERTSON: Well, objection. Your question --

MR. BROWN: I'll rephrase the question.

MR. ROBERTSON: Well all these questions have a fundamental flaw in them.

MR. BROWN: That may be. I'll let you argue that to the judge. I'll ask the question --

MR. ROBERTSON: No, you are creating a question that seems to characterize the testimony, and I want to be sure that we are characterizing it correctly. He has not --

MR. TURNER: Well, he has withdrawn the question, I believe.

MR. BROWN: I withdrew the question.

MR. ROBERTSON: All right.

BY MR. BROWN:

Q. So, you didn't actually experience, at least as far as you know with wine, a concrete drop in -- well let me rephrase it.

The actual number of cases sold between '84 and '85, July, if you measure a one year period each side of July 1, 1985, you would have a decrease in the (p.68) number of cases you sold; is that right?

A. I don't know if I understand your question, but let me say this -- are you referring now to spirits or wine?

Q. Wine.

A. Okay. Wine, we had an increase. We would have had a substantially greater increase if we did not compete against some Florida produced wines.

Q. Okay. Now, how is it that you know you would have had a substantially greater increase?

A. Because of the price competition.

Q. Well, do you have any records that demonstrate that you would have had a substantial increase?

A. Just general knowledge of the working market.

Price points are an important factor and when your competition, for an example, a wine cooler, can sell a dollar a four pack cheaper,

pack cheaper, that consumer is very price conscious and that severely hampered our sales.

Q. But that's your opinion. You don't have any data to back that up; do you?

MR. ROBERTSON: Well -

MR. BROWN: I'm asking him is it an opinion.

MR. ROBERTSON: Other than the working data of a day-to-day operation?

(p.69)

BY MR. BROWN:

Q. Do you know that you lost sales to your competitors? Have you seen any data that showed you that?

MR. ROBERTSON: He already testified that he has.

MR. TURNER: I haven't heard it yet. I would like to hear it too.

BY MR. BROWN:

Q. If you have seen that data, I would like to know what data it is.

A. Well, let me say this:

You can't - there is no data that I have seen nor read that can quantify what you have lost, but if you have any experience in selling and marketing and you see the significant price disparity, that working knowledge tells you that you are losing substantial sales because of a competitive pricing standpoint.

Q. So, I take it that you didn't go to the Department of Business Regulation or any other central repository of records and find out that while you were losing X number of case sales last year your competitors who are dealing exemption products were gaining the same number of case sales; is that correct?

MR. ROBERTSON: Objection, argumentative.

(p.70)

BY MR. BROWN:

Q. I'm just asking you did you go look at those data.

A. I reviewed data as far as spirit gallonage of Florida produced products for my own personal information.

Q. Where is that data?

A. That data is gallonage reports that are provided by the State of Florida.

Q. Who has possession of that data?

MR. ROBERTSON: The State of Florida for one.

THE WITNESS: The State of Florida.

BY MR. BROWN:

Q. Who has possession of the data that you reviewed?

A. I do.

Q. Where do you have it?

A. I have it in my office.

Q. Here in Miami?

A. Yes. They are Florida wine gallonage reports and spirit gallonage reports.

Q. Sir, over the last five years has there been a trend in the sale of alcoholic beverages in general by your distribution outfit and other distribution outfits in Florida?

(p.71)

MR. ROBERTSON: When you say, "A trend," what type of trend are you talking about; quantity, quality, type of -

BY MR. BROWN:

Q. Have you been selling more liquor each year or less liquor each year since 1980?

A. I would have to review the records. I know for the period of '81 and '82 I believe there was an increase and then '83, '84 and '85 there was a decrease in spirit consumption.

Q. And isn't it true that there was also a decrease in spirit consumption not just for McKesson but for all distributors in Florida?

A. I can't say all distributors in Florida, no, that's not true.

MR. TURNER: You mean collectively overall; do you not?

BY MR. BROWN:

Q. Yes. I mean, if you add yourself in with everybody else that distributes liquor, isn't is (sic) true there will be a decrease in total volume sales since 1980?

A. There is a total decline in consumption, but I can't say it's a decline in consumption from 1980. It may have been a decline in consumption from 1983 to (p.72) 1985, yes, but I don't know about going back to 1980.

Q. Has there been a decline in consumption overall in the Florida liquor market from 1983 to the present?

MR. ROBERTSON: For distilled spirits?

BY MR. BROWN:

Q. For distilled spirits.

A. For distilled spirits, yes.

Q. Has there been a decline since 1983 overall in in (sic) the Florida market with respect to the demand for wines?

MR. ROBERTSON: We are talking gallonage?

BY MR. BROWN:

Q. Gallonage, not price.

A. Since 1983?

Q. Yes.

A. I don't believe so. I believe there has been an increase.

Q. How about since 1982?

A. I would have to go back and review the records.

Q. Could be though?

A. Possibly.

Q. You would agree then, would you not, that if you have lost gallonage sales for the period July 1, 1984 to July 1, 1985, at least part of that reduction (p.73) in gallonage sales could be due to an overall trend of people to drink less; is that true?

A. Possibly, yes.

Q. Well, given that possibility then, how do you attribute your loss -

A. Price competition.

Q. I haven't finished the question.

How do you attribute your loss totally to the effect of these exceptions?

MR. ROBERTSON: I don't believe that he has ever testified that any decrease in sales can be attributed totally to one factor as opposed to any other factor.

BY MR. BROWN:

Q. Is it McKesson's contention that any effect whereby you have lost gallonage sales since July 1, 1985 is attributable only to the price differential on Florida beverages in those statutes?

MR. ROBERTSON: Objection. You may be asking for a legal conclusion.

BY MR. BROWN:

Q. Is that the position that you take?

MR. ROBERTSON: Could you read back the question?

(p.74)

BY MR. BROWN:

Q. Let me rephrase it for you.

Has anything besides the enactment of sections 564.06 and 565.12 and a tax preference to beverages in those statutes, anything besides that that caused you the loss referred to in paragraph nine of Thomas Collins' affidavit?

MR. ROBERTSON: Well -

THE WITNESS: There are other factors.

MR. ROBERTSON: The question is unintelligent. Paragraph nine refers only to the loss because of those factors. It does not speak to the question of whether there might be other loss because of other factors.

MR. BROWN: I'll rephrase it for you again.

MR. TURNER: He's testified that there are other factors.

MR. BROWN: I didn't hear that because counsel was talking at the same time.

BY MR. BROWN:

Q. Is that what you said?

A. Well, rephrase the question and I'll answer.

Q. Are there other sources that caused loss in volume sales for you besides the enactment of the statute you are challenging here?

(p.75)

A. There could be other factors, yes.

MR. TURNER: Well, let the record reflect that I object to the question because it assumes something I don't believe has been shown.

MR. BROWN: I understand.

(Short Recess.)

BY MR. BROWN:

Q. Mr. Starzyk, before we took a break we were talking about paragraph nine of Mr. Collins' affidavit and I would like to ask you a couple more questions about that if I could.

Would you describe for me the records that would demonstrate the loss as a result of competition that is referred to in that paragraph?

MR. ROBERTSON: Well, when you say, "Records," do you mean McKesson's records?

MR. BROWN: McKesson's records.

MR. ROBERTSON: Obviously, to demonstrate you would need the records and the numbers of all the distributors in there.

BY MR. BROWN:

Q. Whatever records McKesson looked at in support of paragraph nine of this affidavit is what I'm interested in.

A. Well, the records that I looked at are (p.76) depletion reports, but more importantly, as you know, anyone who works in McKesson or is trained in marketing, like I said, you go out before and you can survey the stores and you look at the different pricing and the competitive nature, these are things that you are not going to get a specific case number on, but, you know, there is a significant detriment to --or detriment to sales.

Q. Did you do any kind of formalized survey where you went out and checked prices on certain days and wrote down --

A. I have pricing -- I have pricing reports, yes.

Q. Well, would you tell me what the pricing reports are?

A. We do a lot of marketing and surveys. We are out there. Our people are out there weekly, and we do different pricing reports of competitive brands, competitive lines, and we are very much aware of different prices.

Q. When you do those reports, do you maintain them or are they just something you throw away when you are done with them?

A. Some of them may be maintained, some of them might be disregarded.

Q. Did you look at those records?

(p.77)

MR. ROBERTSON: You mean discarded?

THE WITNESS: Discarded.

BY MR. BROWN:

Q. Did you look at those reports or did Mr. Collins look at those reports in arriving at the statement contained in paragraph nine of his affidavit?

MR. ROBERTSON: Well, do you mean did he look --

MR. BROWN: As part of the basis for what you are saying.

MR. ROBERTSON: Well, obviously, if he looked at the reports at any point, historically, they are part of his knowledge that would go to making the affidavit.

Are you asking whether he specifically looked at them at the time of the drafting of the affidavit?

MR. BROWN: Yes.

BY MR. BROWN:

Q. Did he specifically look at those reports?

A. I think general information that I have gained through surveying the marketplace and looking at those reports were, you know, in the communication with Mr. Collins and myself.

Q. So, you and Mr. Collins talked about this (p.78) affidavit before it was signed and that was part of the discussion, at least the information from these market surveys?

A. There are many conversations between Mr. Collins and myself relating to competition and that information is, I think, the basis for Mr. Collins' affidavit, not specific reports.

Q. Who has possession today of whatever specific reports exist?

A. I have copies of depletion reports as does Bill Finney. I have different price surveys.

Q. Price surveys that were done under your supervision?

A. That are done through someone through the house as a general part of our doing business.

Q. And when you say depletion reports, what are those documents?

A. Showing our case sales.

Q. Is that a monthly document or a weekly document or —

A. It's a monthly document, year-to-date sales primarily.

Q. Aside from the depletion reports you have just described and the market surveys you have described, are there any other documents that you looked at or Mr. (p.79) Collins looked at and relied upon to determine a loss?

MR. ROBERTSON: Mr. Starzyk earlier referred to general gallonage figures for the industry.

THE WITNESS: Those are the general reports that we use.

BY MR. BROWN:

Q. And those are the reports that you get from the State of Florida as to how many gallons were sold in a particular period of time?

A. Yes.

Q. There's something I need to ask about Exhibits 1 and 2 just for clarification.

There are no indications on here as to whether this is dollars or gallons.

Do you happen to know?

A. Those are dollars.

Q. Dollars. Mr. Starzyk, it's true under Florida law, is it not, that you can give no more than 10 days credit to a vendor to whom you sell alcoholic beverages?

A. That's Florida law, I believe. I mean, there's more to it than that, but it's 10 days.

Q. When a vendor fails to pay within 10 days, you report them to the Department of Business Regulation; is that not right?

(p.80)

A. They are listed, yes.

Q. What is the effect on a vendor when you do that to them?

A. What is the effect on the vendor?

Q. Yes.

A. Well, if he doesn't pay his bills, then two things happen. One is he would have to be on COD.

Q. And what does that mean?

A. That means he would have to pay for his product on a cash basis, or it can go on a no-ship list.

Q. What is a no-ship list?

A. It means you are not legal — it's not legal to ship this particular account.

Q. And that would mean no distributor to ship to that vendor?

A. I believe that's the way it is, yes.

Q. And that vendor couldn't buy from any distributor unless he paid cash?

MR. ROBERTSON: I haven't been – all these questions have been calling for legal conclusions. I haven't been objection. If you are asking for his –

MR. BROWN: I'm asking his understanding.

MR. ROBERTSON: What his practical (p.81) understanding is?

MR. BROWN: That's what I want, his practical understanding of how it works.

MR. ROBERTSON: You can go to the statute if you want answers to these questions.

THE WITNESS: If you are listed – let me go back

If we do not receive payment, that customer is listed. He should not be – if you are listed with the State of Florida, you as a wholesaler are not allowed to ship him product.

BY MR. BROWN:

Q. In your experience – first, let me ask this:

McKesson often does that with vendors who are tardy in making payments; isn't that true?

A. Yes.

THE WITNESS: They list with the state.

BY MR. BROWN:

Q. Put them on the list, do whatever is permitted by Florida law under 561.42?

A. Right.

Q. In your experience that has been a fairly effective means of collecting debts from vendors; has it not?

(p.81)

A. It's not an effective means of collecting debts. It's a means by law that you cannot ship them product. But we have received so often from vendors – even when we receive bad checks and we have been shipping them, but by the time we get the bad checks, we haven't collected for the merchandise.

Q. Once a vendor gets on a list and cannot receive shipments of beverages from any distributor in the state, isn't it true that in the vast majority of cases he will correct that mistake and get the distributor paid?

A. Not true. We have suffered too many losses for that to be true.

Q. How much did you lose in dollar losses in the fiscal year 1985 as a result of vendors not paying you for beverage product?

A. I don't have the exact knowledge, but I'm going to approximate around \$60,000.

Q. Out of a total –

MR. ROBERTSON: Are you talking about Miami now or –

THE WITNESS: Talking about Miami.

BY MR. BROWN:

Q. \$60,000 that you never again saw, never collected?

(p.83)

A. Correct.

Q. Out of a total sales volume of what?

A. A total sales volume of 100 million dollars.

MR. BROWN: That's everything I have.

CROSS EXAMINATION

BY MR. TURNER:

Q. I have some questions. Mr. Starzyk, you are general manager of the Miami region; is that correct?

A. Yes.

MR. ROBERTSON: Vice-president, general manager.

BY MR. TURNER:

Q. Miami region; is that what you would call it?

A. Of Miami and Palm Beach.

Q. Now, your business apparently is called Miami Crown here?

A. It's a d/b/a, Miami/Palm Beach Crown.

Q. Miami/Palm Beach Crown. And you had a Pacific Crown in California that was closed; that is the company had it.

Is the word Crown a trademark through which McKesson Corporation does business as a distributor?

A. No.

Q. Why do you come about using the word Crown?

(p.98)

BY MR. TURNER:

Q. The same costs that you have for grain neutral spirits.

For example, your Mohawk company buys grain based spirits that could be manufactured in Kansas?

A. They buy alcohol.

Q. Alcohol, that's a spirit, am I correct, when we say alcohol, that could be manufactured in Kansas and shipped to Michigan for bottling or -

A. You know, I really don't know. I don't know.

Q. You don't know where the spirit comes from?

A. I don't know.

Q. Could it come from more than one place?

A. It's possible. I don't know.

Q. Sir, let me ask you this:

As a person familiar with marketing, you don't know that it is, in fact, quite customary for spirits to be distilled in one location and shipped to another location either for blending or for bottling?

A. I'm not - I personally am not a producer or rectifier.

Q. But, you do know it's done?

A. In some way, shape or form, yes.

Q. Let me follow-up just a little bit on the last area that was explored by Mr. Brown.

(p.99)

If McKesson has a product that is made from grain, grain based spirit, and that product is put against a citrus based spirit and the citrus based spirit sells for a lower price, do I understand correctly your position is that you believe that that will cause less grain based products to be sold?

A. I'm saying that a lot of people's decisions are based on pricing, and whatever product is cheaper, then that consumer may buy that product based on price.

Q. So, the corollary of that would be then some of your grain based spirits that can't get down to that level might not move?

A. If it's not competitively priced, it's not going to move.

Q. I see. You are saying that you could take the option of lowering the price of that grain based spirit if it were possible to do that?

MR. ROBERTSON: If it were possible to do that?

BY MR. TURNER:

Q. Yes, or if you desired to do that I mean?

A. If it's possible to do it, yes.

Q. Okay. Now, if you don't carry the citrus based product that you believe is being put at a lower (p.100) price or being advantageously priced, how do you determine that you, McKesson, would have been able to sell more of the products that you carry as opposed to some other distributor selling those products?

A. Well, I look at the -

MR. ROBERTSON: Well, objection, asked and answered. You are asking him to repeat his earlier testimony about their studying of gallonage and -

MR. TURNER: No, no, I'm asking him to tell me how he knows that McKesson -

MR. ROBERTSON: Are you asking him do you have to carry a product in order to know how it sells?

MR. TURNER: No, I'm asking him the question. I want to know if he knows the answer or if he just has -

THE WITNESS: Ask me the question.

BY MR. TURNER:

Q. I'm asking you if a citrus based product is enabled to be sold in greater quantities than otherwise would happen because that citrus based product has a reduced tax, okay, how does -

(Brief Interruption)

BY MR. TURNER:

Q. Okay. Let me try it again.

(p.101)

It is your proposition, as I understand, that reducing the price on citrus based products causes more of those products to be sold and less of the products made from other type alcoholic bases; is that generally correct?

A. I believe that certain products will sell at certain prices, and if they are not competitive, those particular products will not sell.

Now, whether it's - you know, whatever base, but it's a matter of - you know, it's a matter of competitive pricing.

Q. All right. You are saying that without the - is it correct that you are saying -

A. A lot of products that I have, if I could sell them for five or six dollars cheaper because the cost was less expensive, then I could move a lot more of certain products.

Q. All right. But let's take the other side. Let's look at it from the standpoint of the citrus product that is receiving the reduced base or the reduced tax.

You are saying that that reduction in tax helps that product to move as against the product, the grain based product or whatever other base may not be receiving the benefit?

(p.102)

A. I'm saying -

MR. ROBERTSON: We will stipulate to that.

MR. TURNER: All right.

THE WITNESS: The grain produced product, whether it's a grain – it doesn't have to be – well, for example, let's take, for example, a rum.

MR. TURNER: I think your counsel has stipulated to my proposition that the reduction in tax will help that product move as against other products where it would not move but for the reduction in tax.

MR. ROBERTSON: We will stipulate to the proposition that when products compete, if one product pays a lower tax, it is a better competitor.

MR. TURNER: If you are not going to stipulate to my question, I need to ask the question again. I'm not interested in the way you phrase it. I want to phrase it the way I understand it.

BY MR. TURNER:

Q. All right, sir, is it correct that with a reduction in tax a citrus based product will move better as against a grain based product?

MR. ROBERTSON: Objection, vague and

(p.123)

A. Well, I think pricing is very – pricing on a lot of products that we represent, if they had the same equal advantage as far as pricing goes, they would sell a lot more.

[BY MR. BROWN:]

Q. You testified earlier that the fact there is a tax advantage of some kind to a particular liquor or wine does not necessarily mean that

that tax advantage will be passed along by the manufacturer of that product; isn't that right?

MR. ROBERTSON: I think you are referring to what I said.

BY MR. BROWN:

Q. Do you have a whole different opinion from that?

MR. ROBERTSON: Could you state that again?

MR. BROWN: Let me try it one more time.

BY MR. BROWN:

Q. Is it your opinion that in some cases a manufacturer of a particular product may receive a tax advantage somewhere and not pass that tax advantage down the line to a distributor who deals with that product?

A. I'm not familiar with any of those situations.

Q. I'm sorry?

A. I said I'm not familiar with their situation.

(p.124)

Q. So, you don't know what pricing decisions the manufacturers are making?

A. All I know is what the costs are to me. I don't know if he is getting passed on a special tax or not. I have no knowledge of that.

Q. So, as far as you know, Bacardi could be receiving in Puerto Rico a tax advantage that, say, equated to five or six dollars a gallon but not be passing that on to you; isn't that true?

A. That's a possibility.

Q. And if all your distributors – excuse me, all of your manufacturers are all getting a five to six dollar a gallon tax advantage

under Florida law, for all you know, they may or may not pass that along to you; isn't that true?

MR. ROBERTSON: Well, the question is a hypothetical.

MR. BROWN: That's true, it's a hypothetical.

THE WITNESS: I don't know of any tax advantages that anyone is receiving and, therefore, I couldn't answer your question because I really don't know.

BY MR. BROWN:

Q. Let me just get back to one kind of basic question, and I realize that I am coming from a (p.125) consumer standpoint. I remember, for instance, when I was in high school -

MR. ROBERTSON: Are you saying that the state is a consumer?

(Discussion off the record.)

BY MR. BROWN:

Q. I seem to remember some of my colleagues back in high school didn't have a lot of money in their pockets, and so when it came to purchasing various beverages, they would consider price.

There were some beverages, however, no matter how low the price that none of the people I associated with would lower themselves to drink.

MR. ROBERTSON: We obviously went to different high schools, but go on.

BY MR. BROWN:

Q. Is there some point in a purchaser's mind they simply have a psychological (sic) distaste for a product and no matter what the price is they are not going to buy it?

MR. ROBERTSON: Some people?

BY MR. BROWN:

Q. Some of your customers?

A. Number one, my customers shouldn't be in high school because they should be a minimum of 21 years (p.126) old.

Q. I'm presuming that they are of legal age when I ask that question.

A. There are different reasons for people to purchase.

Some of them have been image. Some of it may be status. Some of it may be advertising to create it, so there are different things that turn different people on, and the things that I mentioned are one, but pricing is another, whether it's alcoholic beverages or anything.

Q. It is a fair statement though, is it not, that regardless of price among some of your customers there are simply some prejudices for whatever reason that exist which will make them decide nine times out of ten not to purchase a product regardless of how low it's priced?

A. There are examples where people will buy things not based on price, yes.

Q. In fact, isn't a lot of the marketing in the liquor industry geared to the creation of an image not related to price at all?

A. Some marketing is geared on image, some is geared on value, and some is geared on pricing, some is geared on convenience.

(p.127)

MR. BROWN: I have nothing further.

MR. TURNER: Thank you.

MR. BROWN: Thank you.

Are you all going to waive reading and signing on this?

(Discussion off the record.)

MR. ROBERTSON: For the purposes of the hearing on November 12th with respect to our motions for partial summary judgment and a preliminary injunction, we waive the review and signing of the transcript.

However, we reserve the right to object to the use of any portion of that transcript which is obviously inaccurate.

MR. BROWN: That's a half way – I don't know how to do that under Florida law, so what I'm going to suggest is on the record that I have requested a complete waiver of signing and –

MR. ROBERTSON: You have requested it. I'll give it to you for purposes of this hearing. For purposes of this hearing, we will waive review and signing.

MR. TURNER: You need to get a signature. You are going to get it signed.

MR. ROBERTSON: Well, we will ultimately –

* * *

(p.129)

(Court Reporter's Certificate Omitted in Printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiff McKesson Corporation ("McKesson") on October 17, 1986, filed motions for partial summary judgment and for a preliminary injunction that challenge the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985) under the federal Constitution. Defendants on November 4, 1986, responded with defendants' motion to dismiss.

McKesson submits that its memorandum in support of its motions establishes not only why this Court should grant McKesson's motions and declare the sections unconstitutional but also why this Court should deny defendants' motion to dismiss. Nevertheless, for the Court's convenience, McKesson in this memorandum will respond to defendants' arguments in their motion to dismiss.

Defendants in their motion contend that McKesson, which paid excise taxes under the Florida statutes, does not have standing to challenge the constitutionality of the statutes. Defendants also argue that the Florida statutes, which discriminate in favor of Florida's agricultural products, constitute a permissible regulation of commerce. Neither argument has merit.

I. THIS COURT CORRECTLY HAS DETERMINED THAT McKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

At the November 12, 1986, hearing on McKesson's motions, this Court determined that McKesson has standing to challenge the constitutionality of the Florida statutes under the federal Constitution. In effect, the Court considered defendants' principal argument in their motion to dismiss and rejected defendants' position. This Court properly resolved the issue.

The United States Supreme Court, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), established that a liquor wholesaler has standing to challenge the constitutionality of a state liquor excise tax upon the wholesaler's products. The Court in *Bacchus* held that when a wholesaler must pay the tax on its products to the state, the wholesaler has standing to challenge the tax. *Id.* at 267.

The Florida Supreme Court, in *Miller v. Publiker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), affirming this Court's judgment, adopted an expansive view of standing in a case challenging the constitutionality of a Florida gasohol tax scheme. The Court held that a plaintiff has standing to challenge the constitutionality of a tax statute if enforcement of the statute adversely affects the plaintiff's personal or property rights, even if the plaintiff is not liable for the tax. *Id.* at 1375-76.

Under the decisions in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and in *Miller v. Publiker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), McKesson plainly has standing to challenge the constitutionality of the Florida statutes in this Court. McKesson, as a distributor of alcoholic beverages, is liable for the tax. (Collins' Affidavit, ¶¶ 3 and 4.) Under sections 564.06 and 565.12, Florida Statutes (1985), McKesson, as a distributor, has paid the excise taxes on its products to the State whether its customers have paid for

products or not. (Collins' Affidavit, ¶ 4.) Moreover, McKesson's products, which did not receive the tax exemptions and preferences, have competed with other distributors' products, which did receive the tax exemptions and preferences. (Collins' Affidavit, ¶¶ 7 and 8.) As a result, McKesson has suffered economic losses. (Collins' Affidavit, ¶ 9.) Consequently, Florida's enforcement of the tax has adversely affected McKesson's property rights.¹

Parenthetically, the Court also should note that even defendants' representation that McKesson does not distribute any products that would qualify for the Revised Florida Products Exemption's tax preference but for its Take Back Provisions is inaccurate. For example, McKesson distributes Mt. Gay Rum from Barbados. (Collins' Affidavit, ¶ 8.) Mt. Gay Rum, which is manufactured from sugarcane, would qualify for the tax preference under section 565.12(1)(b), Florida Statutes (1985), but for the Take Back Provisions.

Barbados, by virtue of its status as a beneficiary country under the terms of the Caribbean Basin Economic Recovery Act, 19 U.S.C.A. § 2702 (West Supp. 1986), and Presidential Proclamation 5133 of November 30, 1983, receives trade benefits from the United States for its alcoholic beverages. Under the Act, Barbados cooperates with the United States in administering the trade benefits. *See* 19 U.S.C.A. § 2702(c)(11). In addition, a Barbados government agency, the Barbados Export Promotion Corporation, provides economic advantages to Barbados rum manufacturers by identifying export markets, providing export contacts, and providing marketing advice and guidance. Therefore, under the Florida law's Take Back Provisions, McKesson's Mt. Gay Rum from Barbados, which would

¹ Florida cannot argue that McKesson does not have standing to challenge the tax statute because it could receive the tax exemptions and preferences by selling the favored products. The majority in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), rejected the dissent's similar standing argument.

otherwise qualify for a tax preference, is ineligible to receive Florida's unconstitutional tax break.

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION

In response to McKesson's contention that the Florida law purposefully and effectively discriminates against commerce from other states and countries, defendants argue that the Florida statutes cannot offend the federal Constitution because the statutes do not discriminate against commerce from *all* other states and countries. Defendants insist that the Florida statutes, which protect Florida Products, are constitutional because *some* other states and countries are able to produce the Florida products. In effect, defendants ignore that the constitutional issue is not whether the Florida statutes effectively discriminate against commerce from *every* other state and country, but whether it effectively discriminates against commerce from *any* other state or country.

When the United States Supreme Court, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), reviewed a North Carolina statute that discriminated against states that used more rigorous grading standards for apples than North Carolina used, the Supreme Court specifically noted that the statute did not discriminate against all states that exported apples to North Carolina but only against seven other states that had their own grading systems. The Supreme Court rejected North Carolina's argument that its statute did not distinguish states by name and ruled that the statute, which primarily imposed a barrier against Washington's apples, violated the Commerce Clause.

When the United States Supreme Court, in *Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941 (1982), reviewed a Nebraska statute that discriminated against states that did not grant reciprocal rights to transport ground water, the Supreme Court determined that the statute, which did not discriminate against all states, operated as a barrier to

commerce between Nebraska and Colorado. The Supreme Court declared the Nebraska statute unconstitutional under the Commerce Clause. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

When the United States district court, in *Mapco, Inc. v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979), reviewed an Ohio statute that discriminated against states that produced low-sulfur coal rather than high-sulfur coal, the court recognized that the statute did not discriminate against all states. The district court voided the Ohio statute, which imposed a barrier against some states' coal exports, even though the statute did not specifically favor only Ohio products.

When the Florida Supreme Court, in *Miller v. Publiker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), reviewed this Court's finding that a Florida statute discriminated against other countries that produced alcohol for gasohol, the Supreme Court agreed with this Court that the fact that the statute did not discriminate against other states did not save the law from constitutional attack. The Florida Supreme Court declared unconstitutional the Florida statute, which imposed a barrier against only foreign countries' products, under the Commerce Clause and the Import-Export Clause.

When the Supreme Judicial Court of Maine, in *Private Truck Council of America v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986), reviewed a Maine statute that discriminated against states that imposed certain taxes on Maine trucks, the Court specifically rejected Maine's argument that the statute's discriminating "against only some, not all, foreign-registered trucks" made the statute constitutional. The Court noted that "Balkanization, even though only partial, is still Balkanization" and declared the statute unconstitutional under the federal Commerce Clause. *Id.*

Thus, when this Court considers McKesson's challenge to the constitutionality of the Revised Florida Products Exemption, this Court cannot sustain the Florida statutes simply because the Florida

legislature decided to permit a few other states, whose geography and climates allow them to produce the favored products, to petition Florida to participate in the discrimination against the disfavored products. Rather, this Court must declare the Florida statutes unconstitutional because the statutes discriminate against commerce from the majority of states whose geography and climate do not permit them to produce the favored agricultural products. As federal and state courts consistently have decided in similar cases, the Florida statutes' not discriminating against every other state and country simply does not redeem the statutes' unconstitutional discrimination against some states and countries.

Further, defendants' argument that the Florida statutes simply constitute a permissible regulation of commerce does not withstand analysis. Defendants repeatedly have invoked *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), for the proposition that a state may enact laws that have the purpose and effect of encouraging local commerce, but have not acknowledged that the Commerce Clause circumscribes the means by which a state may constitutionally seek to promote its own commerce. The Supreme Court in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), summarized the *Bacchus* holding:

Thus, in *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry" [468 U.S. 263, 271 (1984)], we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business [*id.* at 278].

Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. The tax statutes' purpose is illegitimate, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. See *Dean Milk Co. v.*

Madison, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

Defendants' citing to *Parker v. Brown*, 317 U.S. 341 (1943), does not rescue Florida's tax scheme. In *Parker*, the Court found that a California raisin marketing program had neither the purpose nor the effect of discriminating against interstate commerce, that the California regulations concerned intrastate rather than interstate transactions, and that the program's underlying policy comported with federal policies. *Id.* at 359-368. The Court concluded that the state program was a permissible regulation of local industry. *Id.* at 368. In contrast, Florida's tax scheme, which attempts to promote the sale of Florida products and discourage the sale of other states' and countries' products, directly discriminates against interstate commerce in both its purpose and effect, and directly conflicts with federal trade policies.

Even if the Florida statutes did not have a *per se* unconstitutional purpose and effect, they still would violate the Commerce Clause because they impose an excessive burden on interstate commerce.

Defendants fail to distinguish between Florida's discriminatory alcoholic beverages tax scheme and less discriminatory alternatives for the stimulation of the agricultural industry. Florida may not discriminate in favor of commerce in Florida's products and against commerce in other states' products because all producers will not compete on equal terms. In contrast, Florida may grant favorable tax treatment to Florida agricultural land because all who purchase Florida land receive equal benefits. Florida's non-discriminatory agricultural land tax reform does not isolate non-Florida competitors for unique tax burdens and thus does not violate the "cardinal rule of Commerce Clause jurisprudence" that a state may not "impose a tax which discriminates against interstate commerce" by providing "a direct commercial advantage to local business." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (quoting *Boston Stock Exchange v.*

State Tax Commission, 429 U.S. 318, 329 (1977), and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959) (emphasis added).

Florida may choose to use state revenues to promote Florida industry. However, if Florida chooses to tax the products sold within the State, it may not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 337 (1977).

CONCLUSION

McKesson's motions for partial summary judgment and a preliminary injunction establish that this Court must find the Florida statutes unconstitutional under the federal Constitution. Defendants' motion to dismiss, which challenges McKesson's standing and its Commerce Clause contentions, does not address McKesson's constitutional claims and does not provide a basis for avoiding McKesson's constitutional arguments.

Accordingly, this Court should grant McKesson's motions and deny defendants' motion.

Dated: November 21, 1986.

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF MCKESSON CORPORATION'S REPLY TO
DEFENDANTS' MEMORANDUM OF OPPOSITION TO
PLAINTIFF'S REQUEST FOR THE COURT TO TAKE JUDICIAL
NOTICE

INTRODUCTION

Plaintiff McKesson Corporation ("McKesson") on October 17, 1986, filed motions for partial summary judgement and for a preliminary injunction that challenge the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985) under the federal Constitution. McKesson also filed a supporting motion and memorandum requesting this Court to take judicial notice of records of official actions of legislative and executive departments, which constitute legislative history of the Florida statutes.

Defendants' memorandum in opposition ignores the significance of McKesson's request for judicial notice. The relevant Florida legislative history strikingly and unambiguously reveals the legislature's unconstitutional protectionist purpose in enacting the Florida statutes. Defendants invite this Court to err by urging the Court to ignore this legislative history and thereby neglect its federal constitutional obligation to determine the legislature's true purpose in enacting the statutes.

I. UNDER THE UNITED STATES SUPREME COURT
DECISIONS CONCERNING THE COMMERCE CLAUSE,
THIS COURT MUST DETERMINE THE FLORIDA
LEGISLATURE'S TRUE PURPOSE IN ENACTING THE
REVISED FLORIDA PRODUCTS EXEMPTION.

The United States Supreme Court has declared that state statutes that reveal a discriminatory purpose, or cause a discriminatory effect, are virtually *per se* invalid under the United States Constitution's Commerce Clause. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *Philadelphia v. New Jersey*, 437 U.S. 617, 624-26 (1978). Furthermore, the Court has squarely established that "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940).

Therefore, this Court has a federal constitutional obligation to determine the legislature's true purpose in enacting the Revised Florida Products Exemption.

II. UNDER THE UNITED STATES SUPREME COURT
DECISIONS CONCERNING THE COMMERCE CLAUSE,
THIS COURT MAY CONSIDER THE LEGISLATIVE
HISTORY IN DETERMINING THE FLORIDA
LEGISLATURE'S TRUE PURPOSE IN ENACTING THE
REVISED FLORIDA PRODUCTS EXEMPTION.

Since, under the United State Supreme Court's decisions, the Court must determine the Florida legislature's purpose in enacting the statutes, the Court should consider the legislative history, which so plainly reveals that purpose.

Repeatedly, in challenges to state statutes on Commerce Clause grounds, the United State Supreme Court has reviewed legislative history to identify the state legislature's intent. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42 n.8 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (testimony before a state Senate committee supported the inference that the legislature had passed a challenged provision in response to the pleas

of local businesses seeking protection from competition); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law challenged on Commerce Clause grounds).

The United State Supreme Court similarly has focused on legislative history in numerous other cases to find expressions of legislative intent. See, e.g. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking (sic) body, minutes of its meetings, or reports" may show discriminatory purpose); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 457-461 (1974) (legislative history provides clear expression of legislative purpose).

Defendants attempt to distinguish these cases by suggesting that the Court, although it considered the legislative history, did not decide the cases entirely upon the legislative history. Defendants' assertion, even if correct, misses the point. The fact that the courts may have relied on other grounds in striking the unconstitutional statutes does not diminish the fact that the court considered the legislative history. When a court must determine the legislature's true purpose in enacting a statute, as this Court must in this case, the court may consider the statute's legislative history. If the Court finds a protectionist purpose for the statutes -- and the legislative history will establish that purpose -- that finding alone is sufficient to condemn the statutes under federal constitutional law. The Court, of course, may decide to declare the statutes unconstitutional after considering other grounds.

Defendants' argument that the Court should ignore the Florida legislative history because the statutes are not ambiguous also is irrelevant. The Court in this case must review legislative history to determine the legislature's true purpose in enacting the statutes, not to determine the proper construction of the challenged statutes. The legislative history is critical to that task.

Defendants have offered this Court no evidence whatsoever that the legislature had any purpose other than ingeniously circumventing the

holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and preserving the former Florida Products Exemption's protectionist effect. The legislative history overwhelmingly establishes the Florida legislature's protectionist purpose in enacting the Revised Florida Products Exemption. This Court may resolve this case on the legislative history alone.

CONCLUSION

Federal constitutional law requires this Court to determine the Florida legislature's true purpose in enacting the Revised Florida Products Exemption. In discharging its obligation, the Court need look no further than the legislative history, which unequivocally establishes the legislature's protectionist purpose. The United States Supreme Court's admonition in *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940), that "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious" applies in this case. The old Florida Products Exemption was forthright in its discrimination, and was unconstitutional. The Revised Florida Products Exemption is ingenious in its discrimination and it, too, is unconstitutional.

The Court should grant McKesson's request that the Court take judicial notice of the legislative history.

Dated: November 24, 1986.

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT,
LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF MCKESSON CORPORATION'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION TO
STRIKE PORTIONS OF AFFIDAVITS OF
HAROLD P. OLMO AND ANNE E. PECK

INTRODUCTION

Plaintiff McKesson Corporation ("McKesson") on October 17, 1986, filed affidavits in support of its motion for partial summary judgment and for a preliminary injunction. Defendants on November 3, 1986, filed a motion to strike portions of two of those affidavits: Dr. Harold P. Olmo's affidavit and Dr. Anne E. Peck's affidavit. McKesson submits this memorandum to respond to defendants' arguments in their motion to strike.

Defendants in their motion contend that Dr. Olmo and Dr. Peck are not competent to testify to particular matters in their affidavits, and that they do not establish the factual basis underlying certain of their opinions. Defendants, however, do not challenge Dr. Olmo's or Dr. Peck's credentials to speak to the Court as expert witnesses. Nor do defendants suggest that either Dr. Olmo's or Dr. Peck's statements are factually incorrect in any respect. Rather defendants in this motion suggest that Dr. Olmo, one of the world's foremost authorities on the cultivation of grapes used for wines, and Dr. Peck, one of the nation's principal authorities on agricultural economics, are not qualified to make statements concerning fundamental propositions within their areas of expertise.

I. THIS COURT MAY CONSIDER THE OLMO AFFIDAVIT.

Defendants contend that Dr. Olmo may not make basic statements about why manufacturers of wines and wine coolers generally use certain grape species in light of consistent consumer preference, and that, therefore, grape producers who grow the preferred species have an advantage over grape producers who cannot grow the preferred species. (Olmo's Affidavit, ¶ 5.) In support of their contention, defendants cite *Prohaska v. The Bison Co., Inc.*, 365 So. 2d 794 (Fla. Dist. Ct. App. 1978), in which the court states that witnesses who have "no special knowledge or skill and had no professional training or experience of any sort" in the relevant subject matter may not offer expert testimony. *Id.* at 797.

Dr. Olmo has been a professor of viticulture for almost 40 years. In addition to his academic training and experience, he has been retained by governments throughout the world as a consultant in the cultivation of grape varieties. In recognition of his standing and expertise, he has been a Fellow at the American Association for the Advancement of Science, a Guggenheim Research Fellow, and a Fulbright Research Scholar. In recognition of his contribution to the science of wine production, he received an Award of Merit from the American Wine Society and an Award of Merit from the American Society of Enology and Viticulture. (Olmo's Affidavit, ¶ 2.)

Dr. Olmo, with more than 50 years experience in the field, does not need to recite a market survey to generate details explaining consumer preference in wines. Moreover, his opinion, that grape producers who grow the *Vinifera* species have had a competitive advantage over grape producers who cannot grow the *Vinifera* species, is preceded, quite clearly, by the factual predicate. (Olmo's Affidavit, ¶ 5.)

In light of the above, defendants' argument challenging Dr. Olmo's affidavit is frivolous.

II. THIS COURT MAY CONSIDER THE PECK AFFIDAVIT.

Defendants contend that Dr. Peck, who, while at Stanford, Harvard, and Purdue, taught courses on agricultural prices and markets (Peck's Affidavits, ¶ 2.) is not qualified to make fundamental statements about agricultural prices and markets. For more than 15 years, Dr. Peck has studied issues concerning commerce in agricultural products. Her experience, both domestic and international, in agricultural economics, includes service as Director at the American Agricultural Economics Association and advisor to the Food and Agriculture Organization of the United Nations. *Id.*

Defendants cite *Husky Industries, Inc. v. Black*, 434 So. 2d 988 (Fla. Dist. Ct. App. 1983), for the proposition that expert testimony must have a factual basis for any opinions advanced. Much of Dr. Peck's affidavit reports facts rather than opinions. Where Dr. Peck states an opinion, as in paragraph 8, 9, 11 and 13, the factual predicate is plainly stated.

Defendants do not suggest for a moment that manufacturers of alcoholic beverages cannot use various agricultural products to make alcohol. Indeed, at the hearing on November 12, defendants did not even respond to McKesson counsel's statement of basic fact that manufacturers of alcoholic beverages -- such as vodka -- can manufacture vodka from any number of agricultural products. Instead of attempting to offer a factual challenge to Dr. Peck's affidavit, defendants in their motion offer such arguments as urging the Court to strike phrases such as "commercially significant amounts." The phrase, commonly used by economists, is based on United States Department of Agriculture statistics, which are used by all agricultural economists. Dr. Peck simply deduced that any state included in the U.S.D.A. crop report produces that crop in commercial significant amounts; and, any state not included in the U.S.D.A. crop report does not produce that crop in commercially significant amounts. Phrases such as "commercially significant amounts," uncommon nor nebulous, and requiring Dr. Peck to include a detailed explanation of what such phrases mean would turn a relatively brief affidavit into a

Dr. Peck in her affidavit states in economic terms, regarding competition in markets, what the Supreme Court has been stating in legal terms since *Guy v. Baltimore*, 100 U.S. 434 (1880). Products from various states and countries freely compete in the American marketplace. When a state discriminates in favor of its own products, the free market, in which some products are advantaged and other products are disadvantaged, is distorted.

CONCLUSION

Neither plaintiff nor defendants dispute the fundamental facts in this case. Dr. Olmo and Dr. Peck report what everyone knows. The majority of states produce agricultural products that can be used to make alcohol for alcoholic beverages. However, many of these states that produce one or more of these agricultural products cannot produce citrus or sugarcane, and do not produce the Florida grape species. Therefore, when Florida intervenes in the market and discriminates in favor of Florida's products, Florida's intervention necessarily has an effect on interstate commerce.

In addressing the issues before it, this Court may consider these two expert's observations and opinions.

Dated: November 21, 1986.

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No. 88-192

Supreme Court, U.S.

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In the Supreme Court

OF THE United States

OCTOBER TERM, 1988

McKesson Corporation,
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

JOINT APPENDIX VOLUME II

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PETITION FOR CERTIORARI FILED, July 28, 1988
CERTIORARI GRANTED, November 14, 1988

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IN THE CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

MCKESSON CORPORATION,

Plaintiff,

vs.

CASE NO. 86-2997

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, and OFFICE
OF THE COMPTROLLER, STATE OF FLORIDA,

Defendants.

ORDER ON MOTION FOR PARTIAL SUMMARY
JUDGMENT AND FOR PRELIMINARY INJUNCTION

This matter came to be heard on Motion for Partial Summary Judgment filed by the Plaintiff and the Court having heard argument of counsel and being otherwise advised in the premises hereby finds:

1. Plaintiff is and has been a licensed distributor of beer, wine and distilled spirits in the State of Florida. As a licensed distributor, it is liable for the payment of alcoholic beverage taxes pursuant to F.S. 564.06 and 565.12 (1985) the legal incidence of which falls on Plaintiff by virtue of its status as a licensed distributor.

2. Plaintiff sells wine subject to the full rates of taxation set forth in F.S. 564.06 (1), (2), (3) and (4) and distilled spirits subject to the full rates of taxation set forth in F.S. 565.12(1)(a) and (2)(a). These wines and distilled spirits are not now exempt or entitled to a tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985). These alcoholic beverages are manufactured both in states other than Florida and in foreign countries.

3. Such alcoholic beverages sold by Plaintiff compete in the Florida market place with alcoholic beverages of the same type as referred to in paragraph 2 above but which have been granted a tax exemption or tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985).

4. The Plaintiff has challenged the constitutionality of F.S. 564.06 and 565.12, including the tax preference provisions found in F.S. 564.06(2), 564.06(3) following the term "\$3.00 per gallon," F.S. 564.06(4) following the term "\$3.50 per gallon," 564.06(7), and 564.06(9) through (13) and F.S. 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) (1985).

5. Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held a Hawaii liquor tax exemption for locally produced alcoholic beverages unconstitutional as a violation of the Commerce Clause, Florida's alcoholic beverage laws granted excise tax exemptions and preferences to alcoholic beverages manufactured or bottled in Florida from Florida grown products. The similarity between these provisions of Florida law, and the Hawaii law struck down in *Bacchus* prompted the Florida Legislature to consider revising the statutes.

6. During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes (1985). The legislature removed the requirement from the former provisions that alcoholic beverages had to be produced from Florida products and manufactured and bottled in Florida, substituted language identifying certain agricultural products whose use in the production of the alcoholic beverages would entitle the manufacturers and distributors to tax preferences and exemptions, and inserted language denying the tax exemption or tax preference in certain circumstances.

7. These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic

beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

Based upon the foregoing, it is hereby ORDERED and ADJUDGED:

1. That Plaintiff has standing to challenge the constitutionality of the alcoholic beverage tax statutes.

2. That Plaintiff's Motion for Partial Summary Judgment is hereby granted.

3. That the provisions of F.S. 564.06(2), (3) following the term "\$3.00 per gallon," (4) following the term "\$3.50 per gallon," (7) and (9) through (13) and F.S. 565.12 (1)(b), (1)(c), (2)(b), (2)(c), and (5) through (10) are hereby found to be unconstitutional on their face.

4. That this determination of unconstitutionality shall operate prospectively only from the rendition of this Order.

5. That Plaintiff's Motion for a Preliminary Injunction is hereby granted only to the extent that Defendants' are enjoined from enforcing the statutory provisions declared unconstitutional hereinabove at paragraph 3.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 20th day of March, 1987.

/s/Charles E. Miner, Jr.
CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies furnished to:
David Robertson
Bruce Rogow
M. Stephen Turner
Howell L. Ferguson
Daniel C. Brown

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO.: 191049

(Caption omitted in printing)

NOTICE OF APPEAL OF NON-FINAL ORDER

NOTICE IS GIVEN that the Division of Alcoholic Beverages and Tobacco, State of Florida Department of Business Regulation and the Comptroller of the State of Florida, Defendants, Appellate, appeal to the District Court of Appeal of the First Appellants District of the State of Florida the Order of this Court rendered March 20, 1987. The nature of the order is a non-final order granting partial summary judgment declaring unconstitutional certain subsections and portions of certain subsections of sections 564.06 and 565.12, Florida Statutes (1985) and granting a preliminary injunction restraining defendants from enforcing those portions of the statute which are declared to be unconstitutional.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, The Capitol Bldg.
904/487-2142
COUNSEL FOR DEFENDANT

(Certificate of Service omitted in printing)

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DOCKET NO. _____

(Caption omitted in printing)

SUGGESTION

I. INTRODUCTION

McKesson Corporation ("McKesson") respectfully requests this Court, pursuant to Fla. R. App. P. 9.125, to certify that the Order of the Circuit Court, Judge Charles E. Miner, Jr. (attached as Appendix A) involves issues of great public importance that require the Supreme Court's immediate resolution.

On September 3, 1986, McKesson filed its complaint in the Circuit Court challenging the constitutionality of sections 564.04 and 565.12, Florida Statutes (1985) ("Florida Tax Statutes"). Tampa Crown Distributors, Inc. ("Tampa Crown") and Florida Beverage Corp., Inc. ("Florida Beverage"), and Brown-Forman Corporation ("Brown-Forman") also filed complaints challenging the Florida Tax Statutes. McKesson, Tampa Crown, Florida Beverage, and Brown-Forman asked the Circuit Court to review Florida's enforcement of tax statutes which provide millions of dollars in revenue to the State.

In the separate but related actions, McKesson, Tampa Crown and Florida Beverage, and Brown-Forman present federal and state constitutional claims that question the constitutionality of the Florida legislature's efforts to promote Florida's agricultural industry by granting certain exemptions from taxation and preferences in taxation for alcoholic beverages that use certain favored agricultural products.

Specifically, McKesson makes the following arguments:

- (1) The Florida Tax Statutes impermissibly discriminate against interstate and foreign commerce and thus violate the United States Constitution's Commerce Clause;
- (2) The Florida Tax Statutes impermissibly involve Florida in foreign affairs and international relations and thus violate the United States Constitution;
- (3) The Florida Tax Statutes impermissibly discriminate against foreign imports and thus violate the United States Constitution's Import-Export Clause;
- (4) The Florida Tax Statutes establish improper classifications which violates the United States Constitution's Equal Protection Clause and the Florida Constitution's Equal Protection Clause;
- (5) The Florida Tax Statutes do not set forth sufficient standards or limitations to guide the executive branch in the exercise of its delegated authority and thus violate the Florida Constitution.

On November 12, 1986 and November 26, 1986, Judge Charles E. Miner, Jr. of the Circuit Court, conducted hearings on McKesson's motions for partial summary judgment and for a preliminary injunction, Tampa Crown and Florida Beverage's motion for summary judgment, and Brown-Forman's similar motion. In addition to hearing plaintiffs and defendants, Judge Miner also heard arguments from Jacquin-Florida Distilling Co., Inc. and Todhunter International, Inc., intervening as defendants.

On March 20, 1987, the Court entered its Orders granting, in whole or in part, McKesson's motions for partial summary judgment and for a preliminary injunction, Tampa Crown and Florida Beverage's motion for summary judgment, and Brown-Forman's motion. On the same day, the Attorney General, representing all defendants, filed a notice of appeal.

II. THE APPEAL'S GREAT PUBLIC IMPORTANCE REQUIRES THE SUPREME COURT'S IMMEDIATE RESOLUTION

The Circuit Court declared unconstitutional provisions of a tax scheme that generates millions of dollars in revenue for Florida. For example, Florida collected from McKesson, during its fiscal years ending March 31, 1984, 1985, and 1986, a total of \$86,858,671 in excise taxes under the Florida Tax Statutes and their predecessors and will collect millions from McKesson under the Florida Tax Statutes this fiscal year.¹ In its complaint, McKesson prays for a refund of all monies unconstitutionally collected. Florida continues to collect excise taxes under the tax statutes.² In order to protect Florida's financial position, Florida, as well as the taxpayers, has a significant interest in a rapid determination of the constitutionality of the tax statutes.

The Circuit Court's Orders implicate not only Florida's collection of enormous revenues under the Florida Tax Statutes but also Florida's latitude in promoting its industry without violating the United States Constitution and the Florida Constitution. McKesson claims that the Florida Tax Statutes favor the products of Florida at the expense of the products of other states and countries. Since Florida has no interest in the enforcement of unconstitutional statutes, *see Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982), Florida has a great interest in expeditiously resolving the constitutional issues.

In *Miller v. Publiker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), a strikingly similar constitutional case, Judge Miner found a gasohol tax scheme, which granted a tax preference for gasohol produced from certain agricultural products, unconstitutional under the United States

¹ The legislature revised the Florida Tax Statutes in 1985. McKesson challenges the revised version in this case and challenges the former statutes in a separate case that is not before this court.

² The Circuit Court's preliminary injunction enjoining enforcement of the Florida Tax Statutes' preference provisions was automatically stayed pursuant to Fla. R. App. P. 9.310(b)(2). McKesson plans to ask the Circuit Court to vacate the automatic stay.

Constitution's Import-Export Clause and Commerce Clause. The First District Court of Appeal certified that the circuit court judgment involved issues of great public importance that required the Supreme Court's immediate resolution. The Supreme Court accepted jurisdiction and unanimously affirmed Judge Miner's judgment.

McKesson submits that this case deserves the same procedural treatment.

CONCLUSION

McKesson suggests that the constitutional issues in this case substantially affect Florida's interest, as well as all other states' and countries' interest, in maintaining free, unrestricted trade among the states and with foreign countries and Florida's interest in protecting its revenues from taxes on alcoholic beverages. The issues in this case warrant this Court's exercising its discretion to certify that the Circuit Court Order requires immediate Supreme Court resolution.

CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment, that this appeal requires immediate resolution by the Supreme Court and is of great public importance.

Dated: March 30, 1987.

/s/James M. Ervin, Jr.
JAMES M. ERVIN, JR.
HOLLAND & KNIGHT
P.O. Drawer 810
Tallahassee, Florida 32302
(904) 224-7000
Counsel for McKesson Corporation

(Certificate of Service omitted in printing)

Appendix A IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997

(Caption omitted in printing)

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR PRELIMINARY INJUNCTION

This matter came to be heard on Motion for Partial Summary Judgement filed by the Plaintiff and the Court having heard argument of counsel and being otherwise advised in the premises hereby finds:

1. Plaintiff is and has been a licensed distributor of beer, wine and distilled spirits in the State of Florida. As a licensed distributor, it is liable for the payment of alcoholic beverage taxes pursuant to F.S. 564.06 and 565.12 (1985) the legal incidence of which falls on Plaintiff by virtue of its status as a licensed distributor.
2. Plaintiff sells wine subject to the full rates of taxation set forth in F.S. 564.06(1), (2), (3) and (4) and distilled spirits subject to the full rates of taxation set forth in F.S. 565.12(1)(a) and (2)(a). These wines and distilled spirits are not now exempt or entitled to a tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985). These alcoholic beverages are manufactured both in states other than Florida and in foreign countries.
3. Such alcoholic beverages sold by Plaintiff compete in the Florida market place with alcoholic beverages of the same type as referred to in paragraph 2 above but which have been granted a tax exemption or tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985).
4. The Plaintiff has challenged the constitutionality of F.S. 564.06 and 565.12, including the tax preference provisions found in F.S. 564.06(2), 564.06(3) following the term "\$3.00 per gallon," F.S. 564.06(4) following the term "\$3.50 per gallon," 564.06(7), and

564.06(9) through (13) and F.S. 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) (1985).

5. Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held a Hawaii liquor tax exemption for locally produced alcoholic beverages unconstitutional as a violation of the Commerce Clause, Florida's alcoholic beverage laws granted excise tax exemptions and preferences to alcoholic beverages manufactured or bottled in Florida from Florida grown products. The similarity between these provisions of Florida law, and the Hawaii law struck down in *Bacchus* prompted the Florida Legislature to consider revising the statutes.

6. During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes (1985). The legislature removed the requirement from the former provisions that alcoholic beverages had to be produced from Florida products and manufactured and bottled in Florida, substituted language identifying certain agricultural products whose use in the production of the alcoholic beverages would entitle the manufacturers and distributors to tax preferences and exemptions, and inserted language denying the tax exemption or tax preference in certain circumstances.

7. These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

Based upon the foregoing, it is hereby ORDERED and ADJUDGED:

1. That Plaintiff has standing to challenge the constitutionality of the alcoholic beverage tax statutes.

2. That Plaintiff's Motion for Partial Summary Judgment is hereby granted.

3. That the provisions of F.S. 564.06(2), (3) following the term "\$3.00 per gallon," (4) following the term "\$3.50 per gallon," (7) and (9) through (13) and F.S. 565.12 (1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are hereby found to be unconstitutional on their face.

4. That this determination of unconstitutionality shall operate prospectively only from the rendition of this Order.

5. That Plaintiff's Motion for a Preliminary Injunction is hereby granted only to the extent that Defendants' are enjoined from enforcing the statutory provisions declared unconstitutional hereinabove at paragraph 3.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 20th day of March, 1987.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies furnished to:

David Robertson
Bruce Rogow
M. Stephen Turner
Howell L. Ferguson
Daniel C. Brown

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FL. BAR NO. 353574

(Caption omitted in printing)

**PLAINTIFF McKESSON CORPORATION'S
MOTION TO VACATE AUTOMATIC STAY**

Plaintiff, McKesson Corporation ("McKesson"), through its attorneys, hereby moves this Honorable Court that the Court, pursuant to Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure, enter an order vacating the automatic stay pending appellate review of this Court's March 20, 1987, Order on Motion for Partial Summary Judgment and for Preliminary Injunction.

McKesson bases its motion upon this motion, the memorandum in support of the motion, the pleadings, papers, and documents on file, and upon any oral argument to the Court at the hearing on the motion.

Wherefore, McKesson respectfully prays that the Court enter the requested order.

Dated: March 31, 1987.

(Certificate of service omitted in printing)

/s/ James M. Ervin, Jr.
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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FL. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO VACATE AUTOMATIC STAY

Plaintiff, McKesson Corporation ("McKesson"), submits this memorandum in support of its motion to vacate the automatic stay of this Court's Order of March 20, 1987.

INTRODUCTION

On March 20, 1987, this Court entered an Order in this case declaring unconstitutional certain provisions of sections 564.06 and 565.12, Florida Statutes (1985) and enjoining defendants from enforcing those provisions. On the same day, the Attorney General, representing all defendants, filed a notice of appeal, which automatically caused a stay of this Court's Order. However, the same provision that grants the automatic stay, Fla.R.App.P. 9.310(b)(2), also authorizes this Court to exercise its discretion to vacate the stay.

McKesson submits that this Court should vacate the automatic stay and thereby effectuate the Court's preliminary injunction. The Court's vacating the stay will prevent irreparable harm to McKesson and will cause no harm to defendants, who will realize an increase in alcoholic beverage tax revenues upon the vacating of the stay.

THIS COURT SHOULD VACATE THE STAY
UNDER FLA. R. APP. P. 9.310 (b)(2)

In its motion for partial summary judgment and a preliminary injunction, McKesson demonstrated that the Florida tax statutes, by their protectionist purpose and discriminatory effect, offend the United States Constitution and the Florida Constitution. McKesson maintained that the Florida statutes unconstitutionally create a preferential trade area for local products in violation of the Commerce Clause, unconstitutionally impose a duty upon imports, and unconstitutionally interfere with the federal government's foreign affairs powers. McKesson submitted that this case presents a tax preference scheme as strikingly unconstitutional as the gasohol tax preference scheme struck down in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984). The Court found McKesson's arguments under the Commerce Clause sufficient to justify the granting of the motion. The likelihood that McKesson will prevail on appeal is substantial.

Neither Florida nor McKesson has any interest in the enforcement, even temporarily, of unconstitutional tax provisions. On one hand, if the Court does not vacate the stay, Florida's unconstitutional discrimination against McKesson will continue to cause McKesson to suffer injury in the competitive marketplace, constituting irreparable harm. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948 at 440 (1973 & Supp. 1986). On the other hand, upon the vacating of the stay, defendants may continue to collect tax revenues from McKesson and other distributors under the challenged statutes while the parties pursue any appeals from this Court's Order. Thus, by vacating the stay, the Court would prevent further competitive injury to McKesson and would only bar defendants from discriminating among taxpayers.

Moreover, Florida's continuing to enforce the Florida tax statutes' exemptions and preferences, which this Court has declared unconstitutional, further exposes Florida's revenues to claims for

refunds. In its complaint, McKesson prays for a refund of all monies unconstitutionally collected under the defective tax statutes. McKesson contends that, as a matter of federal constitutional law as well as state law, the corporation is entitled to a refund of all taxes collected under the unconstitutional statutes. Defendants' collecting the taxes from McKesson and others under the unconstitutional statutes jeopardizes Florida's alcoholic beverage tax revenues.

CONCLUSION

In light of this Court's Order of March 20, 1987, neither plaintiffs nor defendants have an interest in a stay of the Court's Order pending appeal. This Court's vacating of the stay will protect McKesson against further unconstitutional injury and will preserve Florida's collection of tax revenues.

Accordingly, McKesson requests this Court to exercise its discretion by vacating the automatic stay.

Date: March 31, 1987.

/s/ James M. Ervin, Jr.
JAMES M. ERVIN, JR.
HOLLAND & KNIGHT
P. O. DRAWER 810
TALLAHASSEE, FLORIDA 32302
(904) 224-7000

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(Certificate of service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

[No Case Number Cited]

(Caption omitted in printing)

MOTION HEARING

The above-entitled matter came on to be heard before the Honorable CHARLES E. MINER, JR., Circuit Judge, at the Leon County Courthouse, Courtroom Number 3, Tallahassee, Florida, on the 2nd day of April, 1987, commencing at approximately 3:20 p.m.

Reported by:

RAY D. CONVERY

Court Reporter

APPEARANCES

HAROLD F.X. PURNELL, Attorney at Law, of the law firm of Oertell & Hoffman, Post Office Box 6507, Tallahassee, Florida, 32314-6705; and

M. STEPHEN TURNER, Attorney at Law, of the law firm of Turner & Mannheimer, Post Office Drawer 11300, Tallahassee, Florida, 32302-0033; and

BRUCE ROGOW, Attorney at Law, 2097 S.W. 27th Terrace, Fort Lauderdale, Florida, 32399-150; and

DAVE ROBERTSON, Attorney at Law, of the law firm of Morrison & Foerster, 345 California Street, San Francisco, California, 94104-2105; and

JOHN K. AURELL, Attorney at Law, of the law firm of Aurell, Fons, Radey & Hinkle, Suite 1000, Monroe-Park Tower, Post Office Box 10154, Tallahassee, Florida, 32302; and

THOMAS J. SCHULTE, Attorney at Law, Peninsula Federal Building, Suite 800, 200 Southeast First Street, Miami, Florida, 33131; and

THOMAS H. BARKDULL, III, Attorney at Law, 7500 Old Cutler Road, Coral Gables, Florida, 33143; appeared on behalf of the Plaintiffs.

DANIEL C. BROWN, Assistant Attorney General, Tax Section, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301; appeared on behalf of the Defendant.

PROCEEDINGS

(p.3)

THE COURT: I see we have other counsel here with us now today.

MR. ROGOW: We do, Judge.

THE COURT: Brought the heavyweights in, our dear friend Thomas J. Schulte, Miami, Florida, is here with us today.

MR. ROGOW: Representing United Liquors, Judge, and Mr. Aurell is going to be representing Jacquin of Florida on appeal. So we thought we'd bring them in early and get the flavor, that good citrus, cane flavor.

THE COURT: All right, Harry.

MR. PURNELL: Yes, sir, Judge. We've got a motion to vacate the automatic stay. As I'm sure everybody here knows, the

order was entered March 20th. The State appealed the same day, and pursuant to Rule 9.310, they're granted an automatic stay, but, of course this court retains jurisdiction to vacate that if that's considered just and proper.

We'd submit, in this case, that all of the equities, all of the justice would dictate lifting the stay. Given consideration of what you ruled, that these statutes are unconstitutional, and impose unconstitutional discrimination, I think it's clear (p.4) that lifting the stay is fair to all parties. To the Plaintiffs, it puts them on equal footing with the Intervenor who otherwise had the benefit of an unconstitutional statute. Intervenor must pay full rate. They no longer get the benefit from the unconstitutional statute, and particularly it's fair to the State who gets the full use of the tax revenues. Upon affirmance, if the stay is lifted, nothing more needs to be done. The case will be ended. In the unlikely event of reversal, the State still has its refund power and can still return those dollars.

THE COURT: The unlikely, did I understand you to say?

MR. PURNELL: Highly unlikely. Your Honor, continuing the stay, however, is unfair and inequitable under the circumstances because, first of all, it continues the discrimination that you found existed with that statute. More importantly, I think it's unfair to the Plaintiffs who fought that statute, had it held unconstitutional. It allows the Intervenor to continue to benefit from an unfair statute.

On the side of the State, it deprives them of the use of the funds. Should your ruling be upheld, but the stay not be lifted, the State's going to have to go back and back-assess, and that's a somewhat complicated (p.5) process, in light of the monthly recomputation of the tax. Also recognizing that your order is prospective only from March 20th, failure to lift the stay opens the State up to potential refunds during the period in which the stay is in effect because of the discrimination that continues to be visited on the Plaintiffs.

Also, the application process for the '87 - '88 fiscal year entitlement to use that refund reoccurs this July. It's about 90 days away. By

lifting that stay, it takes pressure off the State in the effort to grant those as quickly as possible to provide some certainty as to who is entitled to it and who isn't.

We'd respectfully submit that the only fair thing to do in this situation is lift the stay. No one is harmed. It enforces, effectively, what you ruled and puts everybody in the proper status quo.

THE COURT: Mr. Brown, I'm sorry -- I didn't mean to ignore you, would you concur in that observation?

MR. ROBERTSON: Your Honor, I have only a footnote. David Robertson of Morrison and Forrester (sic) for the plaintiff McKesson. Our complaint includes a prayer for damages on the basis that we are paying a tax and others are not paying the same tax, and therefore the entire tax statute is unconstitutional.

(p. 6)

If the Court were not to lift the stay, we would see a continuation of the status quo, and therefore we would see a continuation, a running of McKesson's claim for damages in this case. On the other hand, if the Court were to lift the stay so that all distributors are treated equally, obviously McKesson's claim for damages, although still there, would have far less force since the statute would have been altered.

So I'm in a sense making an argument for the people of Florida and against our prayer for damages in this case by saying that the Court's lifting the stay will increase the security of those tax revenues from attack.

THE COURT: All right, sir.

MR. BARKDULL: Excuse me, Your Honor. My name is Tom Barkdull. I represent Brown Foreman Corporation.

THE COURT: Have you anything to add to what was already --

MR. BARKDULL: I'm going to cut it down real short, Your Honor. I'm in full agreement with Mr. Purnell. The only thing I might add is that the State might want to put these revenues into a special account in the unlikely event that you are reversed, that they can be then refunded back.

THE COURT: You gentlemen make me feel good on this (p. 7) side of the table. Harry said highly unlikely. Is there any reason why you simply used the word "unlikely".

MR. BARKDULL: No, sir. Not at all.

MR. ROBERTSON: I would use the word extraordinarily.

THE COURT: Extraordinarily unlikely, almost unthinkable.

MR. ROBERTSON: Almost unthinkable.

THE COURT: Mr. Brown would not concur with that observation.

MR. BROWN: Your Honor, the State's position here today is as follows: The cases which have been cited on listing an automatic stay are a fairly recent vintage. There is a Supreme Court decision, *The City of Fort Lauderdale Lakes vs. Corn*, decided in 1982 by the Florida Supreme Court, and a decision by the Fourth District in 1984, of *St. Lucie County vs. North Palm Beach Development Corporation*. The sum and substance of those cases is that, with respect to legislative decisions of various organs of public government, the stay is automatic and it's imposed for public policy reasons and should only be lifted under compelling circumstances.

Now, those cases were factually somewhat different (p. 8) than this case is. Those cases dealt with a situation where there would clearly have been irreparable harm to the State's interest should the stay have been lifted and the Plaintiffs allowed to proceed along with the course of conduct they wished to proceed upon.

In this case the State has two interests: One is a fiscal interest, and lifting the stay would not affect the State's fiscal interest because of the nature of the order the Court has entered. The Court has stricken only the exceptions from the statute, leaving the base tax in place. So there should be no revenue implications to the State by lifting the stay.

The other interest of the State is the legislative policy-making position already taken by these statutes that it is in the best interests of Florida to encourage certain agricultural products to be used in the distilling of alcoholic beverages. That interest would in fact be interrupted were the stay to be lifted. I cannot in good faith argue to you that it would be interrupted on more than a temporary basis, should we win reversal on appeal, however.

Because of that balance --

THE COURT: Which I believe you believe to be highly likely, as opposed to Mr. --

MR. BROWN: Well, I suppose if we have to wright (sic) (p.9) the scales, I would have to throw in an "extraordinary" and "highly likely" to contradict the "extraordinary" and "highly unlikely".

I prefer not to do that. I don't think it serves any purpose. In essence what the State's position is is that our interests are fairly evenly balanced in this case, and we would commit it to the Court's sound discretion.

THE COURT: All right. So we've got some that want to lift it. The State is neutral. Now we've got some who don't want to lift it.

MR. ROGOW: Judge, I'm not sure that we should read the State's spirit as being neutral in this case. I think that, while --

THE COURT: He'd be screaming, standing up and stomping if the State really cared; but, go ahead, I'd like to hear what you have to say, Bruce.

MR. ROGOW: Mr. Robertson said something about the people of the state of Florida and I think that's the starting point. The Legislature enacted a statute which provided for certain tax benefits because they thought that that was in the public interest to do so, to encourage the use of these products in manufacturing alcoholic beverages.

The Court has declared that unconstitutional. (p.10) The State has filed a notice of appeal which acts as the automatic stay. The case law speaks in very strong language, and I have copies of both of those cases. *Corn* talks about it is paramount for the government to have unrestricted appellate court review of their authority to act in a legislative capacity, and that's what we're talking about here, acting in a legislative capacity, and only the most compelling of reasons would justify vacating the automatic stay. Indeed, the reason why the automatic stay provision was put in the rule is to allow the State to protect those legislative interests while the matter goes up on appeal.

This court has ruled, but either the District Court of Appeal or the Florida Supreme Court or both, will get a chance to review that. In the interim, our position is that the status quo should be maintained. There is no harm to the State's interest because the State has already chosen this course by enacting the legislation that it did.

The State, by deciding to appeal, has said, "We want to take this up and get review as to whether or not we are right," and the law says that in that situation the stay should remain in effect unless there are the most compelling of reasons, and here, actually, the most compelling of reasons cuts in favor of (p. 11) maintaining the status quo, because, to take away the status quo would mean a whole restructuring of the alcoholic beverage industry with regard to cane and citrus manufacturing, and that's not what the State had in mind. The State had in mind maintaining this industry in the way that it envisioned with regard to the tax break.

Now, ultimately (sic), if the tax break is unconstitutional, then the higher rates will have to be paid, but in the meantime the status quo ought to be maintained because the legislative enactment, even though declared unconstitutional by this court, still, under the Florida Appellate Rules, carries presumption that the status quo should remain intact pending review.

THE COURT: Mr. Aurell.

MR. AURELL: May it please the Court, my name is John Aurell, and I would like to enter my appearance as counsel for Jacquin Florida Distilling Company.

Your Honor, the rule does not say or provide what Mr. Purnell has suggested to you that it does, at least I don't believe so. The (p. 12) rule does not say that, if the Circuit Court finds a statute of the State of Florida unconstitutional that the stay should be lifted because the Circuit Court has found that to be the case. The rule imposes the automatic stay in exactly that situation, and that is done for purposes of public policy that have long been set in place, and there is a heavy burden for the exceptional case when, in your discretion, you may, if you wish, set that stay aside, and I suggest to you that this is not the case here.

We have a partial summary judgment situation. Your Honor ruled as a matter of law. There is an honest dispute as to that decision. I would like to think that you would not have been led into error if I had been here when you ruled, but, in any event, we will try, on appeal, to --

THE COURT: I know you will.

MR. AURELL: -- to get another result, but there is an issue of law. That's what the appellate courts are for. Timely appeals have been filed or will be filed by the Defendants. We're entitled to pursue our remedies that way. Your order is not final to that extent, and I respectfully submit, Your Honor, that there simply has been no

extraordinary showing why the general rule that the stay stay in place should be ignored in this situation.

THE COURT: Mr. Thomas J. Schulte.

MR. SCHULTE: Your Honor, I'm Thomas J. Schulte, and I represent United Liquors, and we're coming in on (p. 13) the appeal, and I would ask the Court to maintain the status quo on behalf of United Liquors. It would, indeed, I think -- know, cause irreparable harm if this stay was lifted. I see no -- have heard no argument as to why it should be lifted, either from the Plaintiffs' side -- the Court's ruling, of course, is not infallible. The Plaintiffs in all due respect, take the position that it is, but this court, as we know, is not final until the Supreme Court gives its infallible decision because it is indeed final, and I would therefore ask the Court to -- implore the Court to maintain this status quo. Thank you. I join in the arguments.

THE COURT: All right. We've got three on one side, three on the other, depending on where you were seated at the counsel table, three asking that it be lifted, three asking that it be preserved.

Now, Mr. Brown, explain your position to me one more time so I don't misstate it. What is the position of the State now with respect to the stay? You're entitled to it. Do you want the stay to remain in force and effect?

MR. BROWN: The State has no strong desires in either direction, Your Honor. We believe that the statute is constitutional, which is why we have taken (p. 14) the appeal. We hope very strongly to succeed in that appeal. As I say, and as counsel for the intervenors have ably pointed out, the law is, the presumption is in favor of the stay, and the burden is upon the Plaintiffs to show some compelling reason why it ought to be lifted, but from the State's interest in this case, given the nature of the Court's ruling, the balancing of the State's interests in its legislative policy and in its fiscal policy, is relatively even, and, therefore, the State has no strong predisposition in either direction, other than the law gives that stay to us, and the Plaintiffs should show some compelling reason for it to be

overcome. We leave that to the discretion of the Court as to whether they have done that.

THE COURT: What was your suggestion, Mr. Barkdull?

MR. BARKDULL: My suggestion, sir, was that, should the stay be lifted, the funds that were generated by the lifting of the stay be placed in a special account, so that, should, in the unlikely event that you would be reversed, it could be easily refunded to the Defendants in this case.

MR. BROWN: On that one, Your Honor, I've got to jump up and scream.

THE COURT: Good, I was wondering if we were going to (p. 15) get a rise out of you at all this afternoon, Mr. Brown.

MR. BROWN: The State would object to that most strenuously, and I'd like to tell you why, if I might. If the Court decides to lift the stay, the practical effect of that will be that beverage distributors around the state, during the interim of the appeal, will pay the full tax rate on all beverages. Those will go into the State Treasury. There is a statutory mechanism in place, Section 215.26, allowing for refunds if we'd be successful on appeal. That administrative process was already created by statute and managed by the Department of Banking and Finance, and I do not wish to see the judiciary interpose itself into the financial management of State Government at this point.

MR. AURELL: Your Honor, if I may?

THE COURT: Yes.

MR. AURELL: One further point on that, it seems to me -- and I hope I'm not wrong for lack of knowledge as to the procedure of the case, but an appeal having been filed, I wonder if this court has jurisdiction to enter an order of that nature at this time?

THE COURT: I rather imagine that about the only thing I can do at this point in time is either decide (p. 16) to keep the stay in place or --

MR. ROBERTSON: Your Honor, could I make one comment about the legal standard?

THE COURT: Sure.

MR. ROBERTSON: I believe that Mr. Brown accurately stated the legal standard the first time he spoke. There are two cases, the *Corn* case and also the case out of the Fourth District which goes by the name of *North Palm*, that talk about the government having a right to have a stay remain in place, but both those cases were situations where developers were trying to overturn governmental planning for an area, and the fear was that, if the stay was lifted, the government would be irreparably harmed.

I think, in this particular case, if you use the actual underlying logic of those opinions, you will see a basis for lifting the stay. We are telling you today that we feel that we are entitled to a refund of tax monies paid under these unconstitutional statutes, and that right continues to accrue as long as that statute has the constitutional problems which led this court to throw it out, and I believe that -- the State obviously can speak for itself, but it would seem to me that the State has a very strong interest in preserving the integrity of the monies it collects under those (p. 17) statutes, which amount to millions of dollars a month, and this Court's not lifting the stay keeps the unconstitutional statute in place and, month by month, increases, in effect, the prayer for damages in this case. On the other hand, if the Court were to lift the stay, the Intervenor would not be irreparably harmed in the event they were to blindfold some court of appeal and get it to reverse you. In that event, as Mr. Brown said --

THE COURT: It seems like a lot of them have been successful in doing that lately.

MR. ROBERTSON: -- there are procedures for getting their money back.

So, to protect the integrity of a statute, to protect -- the Legislature's overriding purpose, I am sure, in enacting the statute was to raise revenues, not to grant the limited exemptions which we've seen, and I think that carrying out the legislative purpose in this particular case would be to free the statute of its unconstitutional provisions in terms of how it taxes next month and the month after that.

MR. ROGOW: Judge, I'd like to give you these two cases because they are the key to it, and --

THE COURT: I think perhaps that would be the best thing, is to let me look at the cases.

(p. 18)

MR. ROGOW: It is paramount for governmental bodies to have unrestricted appellate review, compelling interests, and I have something else to say about this, too, Judge.

THE COURT: Well, before you say it, Dan Brown looks like he was motivated to say something else in response to what this gentleman just said.

MR. BROWN: Your Honor, I'd like to make just a brief comment, and I don't mean this to be flippant, although it may sound that way. I don't think the Court, in its deliberations, although we're submitting it to your discretion, needs to give much weight to the argument that these particular Plaintiffs will hold some sort of financial gun to the State's head if the stay is not lifted. I wouldn't give their prayer for damages much of a prayer, to tell you the truth, but there is the potential out there of some nature which the Court should consider.

THE COURT: Now, Bruce?

MR. ROGOW: This kind of threat that we're going to get money from the State hasn't threatened the State. You don't hear the State worrying about that, and so they have couched this argument in the public interest, public spirit, merely to suit their purposes, but the State isn't worried about that claim for taxes, and Mr. (p. 19) Robertson is wrong about the purpose of this statute. Sure, it's to raise revenue. It's also to encourage industries that will ultimately benefit Florida, not encourage Florida industries. I'm not falling into that trap that Mr. Robertson would like to characterize this case as, but, by encouraging the use of cane and citrus in manufacturing alcoholic beverages, the Legislature has spoken and said, "We want people to use cane and citrus." We have two manufacturers now in Florida who happen to be using that product, and others around the country could if they chose to, and the Legislature has said, "We want them to have the advantage of it."

Where is there irreparable injury? There is irreparable injury to the cane industry, to the citrus industry. That's why the Legislature passed that statute, because to the extent that they take away this tax break pending appeal, those people will not have the benefit of selling their product, which is encouraged by the tax preference.

So it's real nice to hear Mr. Purnell and Mr. Robertson speak about saving the State, but let's get down to basics here: They want to save their client, and we're trying to save our client, and the State is saying, "It doesn't really make much difference to us, (p. 20) Judge, because, either we're going to collect the taxes, or we're not going to collect the taxes," but the State can't be extorted by this kind of argument, Judge. Our clients and the State Legislature are the ones who will be irreparably affected in terms of the State mandate being done away with pending appeal and the tax advantage that our clients have had that cane and citrus producers have had, will be taken away, and that's really what this case is about.

THE COURT: Let me read these cases. I'll be with you in just a very few minutes. Keep your seats everybody.

(Whereupon, a brief recess was had in the proceedings.)

THE COURT: All right, gentlemen. I am not inclined to lift the stay. I'll tell you why I'm not inclined to lift the stay. It has really to do with a healthy judicial respect for the legislative branch of government. I think that they were wrong but I certainly recognize that I'm not the be all and end all, and while I trust that the District Court of Appeal, or whomever, will see fit to affirm, I have to live with the prospect that they may not, but that really doesn't enter into my judgment, into my thinking on this.

(p. 21)

There is a deference that is due to the Legislature of Florida, and I have always tried to pay deference to that. This was, obviously, a planning-level decision made by the Legislature to try to afford some relief in the premises.

Now, while I don't think that they did so in a constitutional fashion, and although the State does not argue strenuously one way or another, I feel that I have got to recognize, certainly, that it's at least a coequal branch of government, and that they've made a decision, and I'm not inclined to lift the stay.

Therefore, the application for lifting the stay will be denied.

Let me have an order to that effect, Mr. Dan Brown --

MR. BROWN: Yes, Your Honor.

THE COURT: -- simply with those words in it and I will sign it. Thank you, gentlemen.

(Whereupon, the proceedings were concluded.)

(Reporter's certificate omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

MCKESSON CORPORATION,
Plaintiff,

v.

CASE NO. 86-2997

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, and OFFICE
OF THE COMPTROLLER, STATE OF FLORIDA,
Defendants.

ORDER ON PLAINTIFF'S MOTION
TO VACATE AUTOMATIC STAY

This matter came on for hearing in Tallahassee, Leon County, Florida on April 2, 1987 for consideration of the Plaintiff's motion to vacate the stay of judgment automatically occurring [sic] as a result of the State Defendants' appeal of this Court's order of March 20, 1987.

Having heard the arguments of counsel and being duly advised in the premises, the Court finds that the policy decisions of the legislature embodied in the statutes under review in this case were made in the public interest and are entitled to deference by this Court, absent compelling circumstances, which have not been shown.

Accordingly, it is ORDERED AND ADJUDGED:

That Plaintiff's Motion To Vacate Automatic Stay is hereby DENIED.
So ordered in Chambers at Tallahassee, Leon County, Florida, this
9th day of April, 1987.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
Circuit Judge

Copies furnished to: James M. Ervin, Jr., Esq. Howell Ferguson, Esq.
Daniel C. Brown, Esq. John Aurell, Esq.
Bruce Rogow, Esq. M. Stephen Turner, Esq.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA,
IN AND FOR LEON COUNTY, FLORIDA. CIVIL.

CASE NO. 86-2997

(Caption omitted in printing)

NOTICE OF CROSS-APPEAL

NOTICE IS GIVEN that the Plaintiff/Appellee/Cross-Appellant, McKESSON CORPORATION, by and through its undersigned attorneys cross-appeals to the District Court of Appeal, First District of Florida, the Order of this Court rendered on March 20, 1987. The nature of the Order is an order granting partial summary judgment declaring unconstitutional portions of Sections 564.06 and 565.12, *Florida Statutes* (1985), granting a preliminary injunction enjoining Defendants from enforcing the provisions declared unconstitutional.

and ordering that the determination of unconstitutionality shall operate prospectively only from the rendition of the Order.

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McKESSON CORPORATION

/s/ Charles A. Wachter for
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FLORIDA BAR NO. 197394

(Certificate of Service omitted in printing)

IN THE SUPREME COURT OF FLORIDA

Wednesday, April 22, 1987

CASE NO. 70,368

DIVISION OF ALCOHOLIC BEVERAGES
& TOBACCO, ET AL.

Appellants,

vs.

McKESSON CORPORATION, d/b/a
MCKESSON WINE & SPIRITS COMPANY,
ET AL.

Appellees.

* * * * *

CERTIFIED JUDGMENT FROM TRIAL COURT - ORDER
ACCEPTING JURISDICTION, ESTABLISHING BRIEFING
SCHEDULE AND SETTING ORAL ARGUMENT

The District Court of Appeal, First District, has certified, pursuant to article V, section 3(b)(5) of the Constitution of Florida, that the order of the trial court passes upon a question of great public importance requiring immediate resolution by this Court. We accept jurisdiction.

Counsel for the parties shall *file* briefs as follows: Appellants' brief on the merits shall be *filed* on or before May 5, 1987; Appellees' brief on the merits shall be *filed* on or before May 15, 1987; Appellants' reply brief on the merits shall be *filed* on or before May 18, 1987.

UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL ARGUMENT WILL BE FORFEITED.

The Clerk of the Circuit Court in and for Leon County, Florida, shall file the original record on or before April 27, 1987.

IT IS FURTHER ORDERED that the above case has been set for oral argument at 1:30 p.m. TUESDAY, MAY 19, 1987, with a maximum of thirty (30) minutes to the side allowed for argument.

BDM

C: Hon. Raymond Rhodes, Clerk
Hon. Paul F. Hartsfield, Clerk
Daniel C. Brown, Esquire
Howell L. Ferguson, Esquire
John Aurell, Esquire
M. Stephen Turner, Esquire
Barry R. Davidson, Esquire
James M. Ervin, Esquire
David G. Robertson, Esquire
Harold F.X. Purnell, Esquire
Bruce S. Rogow, Esquire
Martha W. Barnett, Esquire

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 70,368

(Caption omitted in printing)

On Appeal from the District Court of Appeal, First District,
State of Florida, Case No's. BS-402, BS-403, BS-404

INITIAL BRIEF OF APPELLANTS DIVISION OF ALCOHOLIC
BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS
REGULATION AND OFFICE OF THE COMPTROLLER

(Table of Contents and Table of Citations omitted in printing)

PRELIMINARY STATEMENT

As of Friday, May 1, 1987, the Clerk of Court for the Circuit Court of the Second Judicial Circuit, In And For Leon County, Florida had not completed the compilation (sic) and indexing of the record on appeal in these cases. Appellant, because of the briefing schedule order by this Court, is therefore unable to cite directly to the record in this initial brief. Rule 9.210(b)(3), *Fla. R. App. P.* Appellant has therefore prepared and filed an extensive appendix. Citations in this brief are made thereto.

The deposition of Mr. Stan F. Starzyk is referred to thusly:
Starzyk, p. ____ line ____ - p. ____ line ____.

STATEMENT OF THE CASE AND THE FACTS

On June 29, 1984, the Supreme Court of the United States decided the case of *Bacchus Imports, Ltd. v. Dias*.¹ The *Bacchus* decision constituted a "novel approach to the Twenty-First Amendment".² The Court held for the first time since the enactment of the Twenty-First Amendment to the Constitution of the United States vesting regulation of alcoholic beverages in the several States, that the States may not legislate a beverage excise tax plan which has the purpose and effect of favoring locally produced alcoholic beverage products over such products produced in other places.³

At the time *Bacchus* was decided, the State of Florida, like many other states, had on its statute books alcoholic beverage excise tax provisions which granted tax-preferred treatment to alcoholic beverages made from certain base agricultural crops grown in Florida⁴ and manufactured and bottled in Florida.⁵

In the legislative session next ensuing after the *Bacchus* opinion issued, the Florida legislature repealed the former exemption provisions. The 1985 Legislature enacted, instead, a tax classification system as follows: It imposed a maximum beverage excise tax on wines and distilled spirits in varying maximum amounts, dependent upon type of beverage and percentage of alcohol; it granted tax preference to wines and distilled spirits manufactured from citrus,

¹ 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200 (hereafter "*Bacchus*").

² *Bacchus*, *supra*, at 104 S.Ct. 3064, n.15 (STEVENSON, REHNQUIST and O'CONNOR, JJ., dissenting).

³ *Bacchus*, *supra*, at 104 S.Ct. at 3052, 3057.

⁴ §§564.06, 565.12 Fla. Stat.(1984 Supp.) The crops were not exclusively indigenous to Florida. The full text of the former statutes is set forth at App. 1 - 3.

⁵ §§564.06, 565.12, Fla. Stat. (1984 Supp.)

sugarcane and from grape species which will grow in Florida⁶ or from the by-products or concentrates thereof no matter where the point of manufacture, and, finally, it disallowed the tax preference to eligible alcoholic beverages under certain circumstances.⁷

The new tax provisions strike a balance between encouraging the use of agricultural products which Florida grows for the manufacture of alcoholic beverages and maintaining the tax base provided by the alcoholic beverage excise tax. In other words, the Florida Legislature struck a careful balance between the state's revenue needs and the object of encouraging the use of citrus, sugarcane and certain grape species in the manufacture of alcoholic beverages.

Citrus is grown widely throughout the United States and the world. App. 142 - 147. The same is true of sugarcane. R. ____, App. 148 - 147. The grape species are grown, not only in Florida, but throughout the Southeastern United States and the Atlantic States Region. R. ____, App. 142 - 147. The grape species can be grown anywhere that the vinifera grape species are cultivated. R. ____, App. 142 - 147.

⁶ As will be discussed below, the record reflects that neither sugarcane nor citrus, nor the grape species are exclusive to Florida; all grow other places; and the grape species can be grown anywhere that vinifera grapes can be grown.

⁷ The full text of the present tax provisions are set forth at App. 4 - 7A. For purposes of discussion, the structure of the new tax provisions is readily summarized as follows:

	§ 564.06	§ 565.12
Provisions imposing flat tax on beverages	(1),(3),(4)	(1)(a),(2)(a)
Provisions giving product exemptions	(2),(3),(4)	(1)(b),(2)(b)
Provisions restricting exemptions in cases of advantage in manufacturing jurisdiction	(9)	(1)(c),(2)(c)
Provisions establishing floor, ceiling and sliding scale tax for exempted products	(10)(a),(b)(c)	(1)(b),(2)(b) (5),(6)
Provisions requiring manufacturer to apply for exemptive license	(11),(12)	(9)
Provisions requiring Application fee and annual license fee from manufacturers	(11),(12)	(9),(10)

142 - 147. Nevertheless, alcoholic beverages made from citrus, sugarcane and the grape species are regarded by consumers as less desirable than alcoholic beverages manufactured from vinifera grapes and other agricultural bases. R. ____, App. 134 - 135, 154, 189.

Thus, for example, although the grape species will grow anywhere vinifera grapes will grow, they are not presently grown in California or Italy, nor used there in the manufacture of alcoholic beverages. Introduction of the grape species in those localities would require three to five years. This is true despite the fact that the end product in all fermenting or distilling processes is the same: ethanol. R. ____, App. 152 - 153. Similarly, although citrus is adapted to the production of wine and neutral spirits (ethanol), R. ____, App. 152 - 153, and although citrus is commercially grown in California and Italy, it is not used in the manufacture of wine coolers manufactured by Brown-Forman. Likewise, although sugarcane or its by-product, molasses, is the base from which rum is made, although rum is distributed by McKesson Corporation, Tampa Crown and Florida Beverage, and although sugarcane is adapted to the production of neutral spirits used in making vodka, for example, R. ____, App. 152 - 153, 192 - 193, it is nevertheless regarded as "inferior" for alcoholic beverages. R. ____, App. 134 - 135, 154, 189. Florida, then has an interest in devising means whereby consumers' receptivity to such alcoholic beverages, and thus the use of such products by manufacturers, is encouraged.

In view of the new counsel of *Bacchus*, Florida set about to do so by enacting Ch. 85-203, 85-204, Laws of Florida, effective July 1, 1985.

Not satisfied with the Florida Legislature's response in the wake of *Bacchus*, the Appellees - Plaintiffs below - brought suit. Tampa Crown Distributors, Inc. and Florida Beverage Corporation.

Tampa Crown Distributors, Inc. ("Tampa Crown") and Florida Beverage Corporation ("Florida Beverage") filed their complaint in the trial court on March 6, 1986. It was served on the Division of Alcoholic Beverages and Tobacco ("DABT") on March 17, 1986. R. ____, App. 8. DABT supervises the collection of alcoholic beverage

excise taxes. In a six-count complaint Tampa Crown and Florida Beverage challenged §564.06 and 565.12, Florida Statutes (1985) under several provisions of the Constitution of the United States and the Florida Constitution. The core of the challenges was the contention that the tax-preferred treatment and disqualification provisions of §564.06(2), (3), (4), (9); 565.12(1)(b), (2)(b), (1)(c), (2)(c), Florida Statutes (1985) discriminated in favor of local commerce and against interstate commerce. Tampa Crown and Florida Beverage conceded that they were presenting a challenge to the facial constitutionality of the tax statutes only and were not bringing an "as applied" constitutional challenge. The trial court announced its intention to treat the case as a purely facial challenge to the statutes. R. ___, App. 273. By its Amended Answer, R. ___, App. 41, Motion For Judgment on the Pleadings, R. ___, App. 89, and Motion For Summary Judgment, R. ___, App. 67, DABT raised several Rule 1.140, (sic) defenses and affirmative defenses, including lack of standing, and estoppel.

Tampa Crown and Florida Beverage filed a motion for summary judgment and supporting affidavits. R. ___, App. 61, 181, 184. DABT filed affidavits in opposition to the motion for summary judgment and a stipulation of facts. R. ___, App. 134, 142, 144, 148, 155. Based thereon, the record shows as follows: Florida Beverage and Tampa Crown are licensed wholesale distributors of alcoholic beverages in Florida.⁸ They distribute alcoholic beverages to retail dealers and remit taxes on beverages which are not tax-preferred. Such beverages compete with tax-favored beverages sold by distributors. Appellees make the conclusory statement that, because of the tax differential, they are placed at a competitive disadvantage in the marketing of the products which they distribute. Within the United States, sugarcane is grown in Hawaii, Louisiana,

⁸ Florida law divides alcoholic beverage distribution into three distinct tiers, each of which requires a license to engage in that particular activity: manufacture or importation, wholesale distribution and retail sales to consumers. §§561.14, Fla. Stat. (1985). The legal incidence excise tax is upon manufacturers and wholesale distributors, but is collected at the wholesale level. §§561.50; 561.506(2); 564.06(1),(6); 565.12(1)(a), 565.13 Fla. Stat. (1985)

Texas and Florida. It is grown widely throughout the world in many countries. R. ___, App. 148 - 150. Citrus is grown within the United States in California, Louisiana, Texas, Arizona and Florida. It also grows in the following countries: Brazil, Japan, Spain, Italy, Mexico, Israel, India, Argentina and Egypt. R. ___, App. 142 - 147. The grape species which will qualify an alcoholic beverage for tax preference are presently grown in the Southeastern United States and along the Atlantic Seaboard. They can be grown anywhere that vinifera grapes are grown. R. ___, App. 142 - 147. Wines and other alcoholic beverages manufactured from sugarcane, citrus and grape species are perceived as of inferior quality as compared to wines manufactured from vinifera grapes and other alcoholic beverages made from other crops. R. ___, App. 134 - 135, 154, 189.

Florida Beverage has taken advantage of the tax preference it now challenges by distributing products which hold exemption certificates granted to the manufacturers. Since the passage of the new exemption provisions Florida Beverage has reported as exempt and remitted taxes at the allowed lower rates on 139,019 gallons of distilled spirits and 15,174 gallons of wine. R. ___, App. 156. Florida Beverage distributes rum, which is made from sugarcane or its by-products. R. ___, App. 134 - 135. Tampa Crown has not distributed beverages currently entitled to favorable tax rates. It does not do so because of its belief that the currently exempted products are of inferior quality. R. ___, App. 134 - 135. Tampa Crown does distribute products made from sugarcane. R. ___, App. 134 - 135. It is important to note that neither Tampa Crown nor Florida Beverage is licensed as a manufacturer of alcoholic beverages. They are wholesale distributors only.

Neither Tampa Crown nor Florida Beverage alleged or offered any proof that a manufacturer whose sugarcane, citrus or grape beverages they distribute has ever applied for or been denied an exemption certificate under the disqualification provisions of the law. Nor is there any allegation or proof in the record that such would occur if application were made.

On November 12, 1986, the trial court heard argument on the motions for summary judgment, DABT's motion for judgment on the pleadings, and DABT's motion to strike affidavits. On March 20, 1987 the trial court entered a final judgment. R. ____, App. 274 - 277. The Court did not reach any issue raised by Appellees other than the Commerce Clause challenge. The trial court held that, although the Florida legislature intended to remedy the Commerce Clause deficiency in the prior Florida law occasioned by the *Bacchus* decision, it had failed to overcome the problem. The trial court declared the exemption provisions of §564.06 and §565.12, Florida Statutes (1985) to be in violation of the Commerce Clause as interpreted by *Bacchus*, and made its ruling prospective in nature. From that order the Division of Alcoholic Beverage and Tobacco appeals.

McKESSON CORPORATION

McKesson Corporation did not serve its complaint until September 4, 1986. McKesson's complaint also challenged the tax provisions of §§564.06 and 565.12, Florida Statutes (1985) on several grounds under the Constitution of the United States and the Florida Constitution. DABT and the Comptroller of Florida (also named a defendant in this case) filed their answer on September 23, 1986, raising the defense of standing and the affirmative defense of the severability of the exemptions. McKesson's central contention is, likewise, that the tax exemptions discriminate against interstate commerce and in favor of Florida commerce. Immediately upon answering McKesson's complaint, Division of Alcoholic Beverages and Tobacco served requests for admissions, requests for production of documents and interrogatories going to the subject matter of McKesson's complaint and to DABT's defenses. R. ____, app. 218 - 247. DABT also noticed McKesson for deposition on November 6, 1986. R. ____, App. 248 - 250. McKesson objected to much of the discovery sought by DABT.⁹ McKesson filed affidavits¹⁰ and a

⁹ In paragraph 10 of Defendants' First Request For Admissions, McKesson was asked to admit that during the period of time at issue it did not operate in Florida or elsewhere as a manufacturer of alcoholic beverages. As shown below that request was directly germane to DABT's defense that McKesson, a wholesale distributor, lacked standing since it demonstrated no injury

motion for partial summary judgment and preliminary injunction on October 16, 1986 and noticed the motion for hearing on November 12, 1986. On November 6, 1986 DABT took the deposition of McKesson. Despite the fact that the deposition was taken by designation under rule 1.310(6), *Fla. R. Civ. P.*, the designated spokesman for McKesson spent only two hours preparing to testify. Starzyk, p. 6, lines 7 - 13. The lack of preparation was obvious. For example, of central concern to DABT's standing defense was whether or not McKesson had truly suffered any competitive injury as a proximate result of the existence of the challenged tax preference. Yet, the deponent was unable to say whether McKesson sold more or less distilled spirits in the year succeeding the enactment of Ch. 85-203, 85-204, Laws of Florida, than in the year preceeding it.* Starzyk, p. 66, lines 15 - 19. One of the grounds of appeal in these cases is that the entry of summary judgment was error because of prematurity. The sequential and late filings of these actions, together with the lack of opportunity to complete discovery before hearings on the various

flowing from the existence of the exemptions it was seeking to challenge. McKesson objected to that request on October 28, 1986. R. ____, App. 235 - 247. Also on October 28, 1986, McKesson agreed to produce correspondence between it and Lafayette Vineyards and Winery, Ltd., Todhunter International, Inc. and Jacquin-Florida Distilling Co. regarding the distribution of those manufacturers' products by McKesson. Each of those manufacturers holds exemption certificates under the beverage excise tax law. The obvious purpose of the discovery request was to seek facts showing that McKesson, as a distributor, had access to the tax-preferred product lines and was therefore put to no competitive disadvantage by the existence of the tax preferences. On October 28, 1986, McKesson objected to the request but agreed to produce "any such documents" subject to "agreement of counsel regarding the time, place, manner and scope of production". R. ____, App. 228 - 234. The hearing on McKesson's motion for summary judgment was convened on November 12, 1986. Despite DABT's protest that discovery was not complete, the trial court overruled DABT's objection as to McKesson's standing and proceeded to the merits. In order its on (sic) McKesson's motion for partial summary judgment, the trial court found that McKesson had standing.

¹⁰ DABT moved to strike portions of the affidavits and a Request For Judicial Notice filed by McKesson in support of the motion for summary judgment. The Trial court did not rule on those motions.

motions for summary judgment hampered development and presentation of the defense.

The affidavits, depositions and discovery and pleadings which are of record disclose the following facts: McKesson, like Tampa Crown and Florida Beverage, is licensed only as a wholesale distributor of alcoholic beverages in Florida. It does not operate as a manufacturer. Since July 1, 1985 McKesson has distributed beverages which do not benefit from exemption certificates under §§564.06, 565.12, Florida Statutes (1985). McKesson's products compete with products which do benefit from the exemptions. App. 199 - 202. McKesson asserts that it has suffered a significant loss in product sales as a result of §§564.06, 565.12, Florida Statutes (1985). That assertion is not without dispute in the record. McKesson's designated deponent testified that he never advised the company this his sales operations were suffering a loss because of the tax exemption. Starzyk, p. 118. Mr. Starzyk also testified that any sales loss was possibly attributed to a general decline in consumption habits. Starzyk, p. 72, line 23 - p. 73, line 3., p. 74, lines 1 - 8.

Alcoholic beverage manufacturers may use several grains, fruits and vegetables in the manufacture of alcohol for alcoholic beverages - including citrus, sugarcane and the grapes species listed in §564.06. In the United States, sugarcane is produced in Hawaii, Louisiana, and Texas. Sugarcane is also produced widely throughout the world - in Central America, South America, the Caribbean islands, Southeast Asia, Mexico and the Philippine Islands. App. 148 - 150, 191 - 198.

In the United States, citrus is produced in Arizona, California, Louisiana, Texas and Florida. It is also produced in Brazil, Japan, Spain, Italy, Mexico, Israel, India, Argentina and Egypt. R. ____, App. 142 - 147.

Other crops which may be used in the manufacture of alcoholic beverages - such as grains, corn and potatoes - grow widely in the United States and throughout the world. Many areas which grow such crops cannot grow sugarcane or citrus. R. ____, App. 191 - 198. McKesson Corporation, however, is not engaged in the farming of

any agricultural crop which may compete with citrus, sugarcane or the grape species for use in the manufacture of beverages from raw crops. It operates only as a wholesale distributor of alcoholic beverages. Starzyk, p. 40, line 15 - p. 43, line 25.

The trial court entered its partial summary judgment and preliminary injunction on March 20, 1987, from which this appeal ensues. Therein, the trial court held identically to its ruling in Tampa Crown and made its decision prospective.

BROWN-FORMAN CORPORATION

Brown-Forman did not file its complaint until October 8, 1986. It was served October 9, 1986. Brown-Forman sought declaratory and permanent injunctive relief against the enforcement of §564.06, Florida Statutes (1985) on several constitutional grounds, including the Commerce Clause of the Constitution of the United States. R. ____, App. 19 - 28. On October 31, 1986, DABT served its answer, which included the defense that Brown-Forman lacked standing to challenge the provisions of §564.06(9), Florida Statutes (1985). Brown-Forman R. ____, App. 55-60. On October 31, 1986, Brown-Forman filed a motion for summary judgment. R. ____, App. 74 - 78. On November 5, 1986, Brown-Forman filed affidavits in support of its motion. R. ____, App. 203 - 207. The motion was heard on November 26, 1986.

The following facts appear of record. Brown-Forman is a manufacturer of wine coolers in California and sells such products to licensed wholesale distributors in Florida for resale in Florida. Brown-Forman also imports and sells to wholesale distributors in Florida certain Italian wines. The Italian wines which Brown-Forman imports are made from vinifera grapes, which do not qualify for exemption under §564.06(2), (3), (4), Florida Statutes (1985). The wine coolers which Brown-Forman makes are made predominantly from vinifera grapes. The grape species which will qualify a wine for exemption under §564.06, Florida Statutes (1985) can be grown in Italy and in California where Brown-Forman carries on its operations. R. ____, App. 136 - 147. Commercial citrus production currently

occurs in California. R. ____, App. 136 - 141. Citrus is also produced commercially in Texas, Florida, Louisiana, Spain, Italy, Mexico, Israel, Argentina, and Egypt. The grape species enumerated in §564.06(2), (3), (4), Florida Statutes (1985) can be grown wherever vinifera grapes will grow. R. ____, app. 136 - 147. The California wine image is central to Brown-Forman's advertising of its wine cooler product. All of its wine coolers are packaged in California. R. ____, App. 205 - 206. The Brown-Forman asserts that for it to make the wine-cooler product from "any species" listed in §564.06, Florida Statutes would be prohibitively expensive. R. ____, App. 205 - 206. However, that fact is subject to dispute, since Brown-Forman stipulates that citrus is commercially grown in California, R. ____, App. 136 - 141 and citrus is one the agricultural species listed in §564.06(2), 10(b), Florida Statutes (1985). Further, the grape species listed in §564.06(2) are adapted to growth in many places, including California. There is no showing that Brown-Forman wishes to manufacture a wine cooler made from preferred products, nor that Brown-Forman could not manufacture a wine cooler in California by brining in concentrates of grape species, or other tax preferred products.

Brown-Forman applied to DABT for an exemption certificate under §564.06(2), (10)(b), Florida Statutes (1985) for its "California Cooler" product. The exemption was denied because the cooler is made from products not within the preferred class. Brown-Forman appealed that denial to the First District Court of Appeal, and raised in that appeal the constitutionality of §564.06, Florida Statutes. R. ____, App. 251 - 262. That appeal remains pending. DABT therefore moved that the trial court dismiss Brown-Forman's complaint inasmuch as Brown-Forman had elected its remedy and was precluded from litigating the same issue in circuit court. That motion was denied. R. ____, App. 267 - 272. The trial court entered its final judgment on March 20, 1987, from which this appeal was taken the same date. The final order declares the exemptions to be unconstitutional under the Commerce Clause as interpreted in the *Bacchus* decision and operates prospectively. The trial court did not reach the other constitutional issues raised by Brown-Forman. From that order DABT has brought an appeal.

QUESTIONS PRESENTED

I. WHETHER THE CLASSIFICATIONS OF PRODUCTS FOR FAVORABLE TAX TREATMENT IN §§ 564.06(2), (3), (4), (10) AND 565.12(1)(b), (2)(b), FLA. STAT. (1985) ARE FACIALLY PERMISSIBLE UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER THE CRITERIA FOR DISALLOWANCE OF PRODUCT EXEMPTIONS IN §§ 564.06(9), 565.12(1)(c), (2)(c), FLA. STAT. (1985) ARE FACIALLY PERMISSIBLE UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

III. WHETHER THE RECORD IS INADEQUATE TO SUPPORT SUMMARY JUDGMENT IN FAVOR OF APPELLEES ON AN AS-APPLIED ANALYSIS OF THE EFFECT OF THE TAX EXEMPTIONS UNDER THE COMMERCE CLAUSE.

IV. WHETHER THE TRIAL COURT ERRED IN ENTERTAINING AND GRANTING SUMMARY JUDGMENT TO APPELLEES PREMATURELY.

V. WHETHER THE TRIAL COURT ERRED IN REFUSING TO DISMISS BROWN-FORMAN CORPORATION'S COMPLAINT.

SUMMARY OF ARGUMENT

The trial court approached the case below as a purely facial challenge to the constitutionality of the provisions of §§564.06 and 565.12, Florida Statutes. It confined itself to the Commerce Clause ruling announced in *Bacchus*. *Bacchus* held only that a beverage tax preference which discriminated in favor of *locally produced* alcoholic beverages over beverages produced elsewhere violated the Commerce Clause. *Bacchus*, *Supra*, 104 S.Ct. at 3054, 3056, 3057.

The trial court's order does not make clear the basis of the court's ruling that the new Florida law failed to overcome the Commerce Clause concerns enunciated in *Bacchus*.

If the trial court meant the the Commerce Clause, as interpreted by *Bacchus*, prohibits Florida from classifying certain generic types of alcoholic beverages for different tax treatment than others, if the trial court's ruling was predicated upon Florida's classification of beverages made from sugarcane, citrus and certain grapes or concentrates or by-products thereof, *see* §§564.06(2), (3), (4); 565.12(1)(b), (2)(b), Fla. Stat.(1985), then DABT respectfully submits that the trial court erred. *Bacchus* does not forbid a state's exercise of its taxing power in a way that classifies some generic types of alcoholic beverages for tax treatment different from others; it does not stand for the idea that classifying certain types of alcoholic beverages for favorable tax treatment - without regard to the place of manufacture - constitutes discrimination against interstate commerce. *Bacchus* prohibits only a direct commercial advantage granted by the statute exclusively to local industry over foreign industry.

If the trial court's ruling is based on the premise that the agricultural product classifications in §§564.06(2), (3), (4) and 565.12(1)(b), (2)(b), Florida Statutes (1985) *per se* violate the Commerce Clause, then that ruling sweeps aside the broad leeway accorded to the states in tax classification matters in hundreds of decisions. It further fails to appreciate the distinction between the permissible promotion of local commerce which *affects* interstate commerce and discrimination purely in favor of local commerce, which is impermissible. No case cited by Plaintiffs below holds that the granting tax classification which favors certain types of agricultural products (or their concentrates or by-products) is forbidden by the Commerce Clause unless those products can be grown universally. Yet that is the proposition one must accept if one finds that the product exemptions for sugarcane, citrus and the grape species beverages, are *per se* in violation of the Commerce Clause. Sugarcane is not an agricultural crop which grows only in Florida. It is produced in many place throughout the world. Its by-products are shipped all over the globe for use in manufacture. The same is true of citrus. The grape species, as well, grow throughout

the Southeastern United States and will grow wherever vinifera grapes can be cultivated. Thus, it cannot be said that selecting beverages made from those products or their by-products or concentrates for favorable tax treatment constitutes a direct advantage exclusively to the produce of Florida. The provisions of §564.06(2), (3), (4) and §565.12(1)(b), (2)(b) - the product classifications - must be analyzed instead under the more lenient Commerce Clause balancing test. *E.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174(1970). Under that analysis, the trial court erred in granting summary judgment on this record to plaintiffs below. Moreover, no plaintiff below had standing to challenge the provisions of §565.12.

The trial court may have intended, instead, that the provisions which disallow the product exemptions in some cases - §§564.06(9), 565.12(1)(c), (2)(c) Florida Statutes (1985) - result in discrimination against interstate commerce. However, none of the plaintiffs below alleged or proved any harm to their business flowing from those provisions (hereinafter "the disqualification provisions"). They are therefore without standing to challenge those provisions. The case is not constitutionally ripe for decision on the disqualification provisions on this record. Moreover, the disqualification provisions do not facially discriminate against interstate commerce by protecting Florida markets from interstate competition. *See, e.g.*, *Archer Daniels Midland Co. v. State*, 690 P.2d 177, 187 - 188 (1984). If there were a constitutional flaw in those provisions, it would have to be demonstrated under an as-applied analysis, which requires the adducing of evidence showing a practice and pattern of discrimination. There is no such evidence in these cases. In fact, there is evidence in the record that the provisions of §564.06(9) do not uniformly preclude manufacturers in other states from obtaining favorable tax treatment, and it was not established that a non-Florida beverage product made from sugarcane, citrus or the grape species, or by-products thereof, could not qualify by reason of §§564.06(9), 565.12(1)(c), (2)(c), Florida Statutes (1985).

Therefore, the court erred in granting summary judgment to appellees if the basis of its ruling was that the disqualification provisions contravene the Commerce Clause.

Moreover, the trial court erred in granting summary judgment in these cases without affording DABT adequate time and opportunity to conduct discovery and seek evidence.

POINT I

THE CLASSIFICATION OF PRODUCTS ELIGIBLE FOR FAVORABLE TAX TREATMENT IN §§564.06(2), (3), (4), (10) and 565.12(1)(b), (2)(b) DOES NOT FACIALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE AND IS VALID UNDER THE BALANCING TEST

As noted above, the statutes are divisible into two parts for purposes of analysis here: The maximum or flat tax provisions [§§564.06(1), (3), (4); 565.12(1)(a), (2)(a)] and the exemption or tax preference provisions [§§564.06(2), (3), (4), (9), (10); 565.12(1)(b)(c), (2)(b)(c), (5), (6) Fla. Stat. (1985)]. The tax preference provisions are in turn divisible into two categories for purposes of analysis here: those creating classifications for granting preferential tax treatment to an alcoholic beverage product [§§564.06(2), (3), (4); 565.12(1)(b), (2)(b), Fla. Stat. (1985)] and those disqualifying an otherwise eligible beverage from receiving the tax preference [§§564.06(9), 565.12(1)(c), (2)(c), Fla. Stat. (1985)]. The trial court viewed the case below as presenting only a facial challenge to the statutes' constitutionality. There is obviously nothing offensive to the Commerce Clause in the flat tax provisions. The trial court so found and declared only the tax preference provisions to be invalid under the Commerce Clause. App. 274 - 283. The trial court did not enunciate its reasoning in finding a violation of the Commerce Clause among the tax preference provisions. However, reaching such a conclusion on a facial analysis of the tax preference provisions necessarily requires a determination that either the product classification or the disqualifying criteria are deficient.

On this record, the product classifications cannot be said to violate the Commerce Clause. There are basically two tests for a statute's validity under the Commerce Clause: a "per se" rule of invalidity in

cases where a statute on its face discriminates in favor of local commerce and against interstate commerce, and a more flexible balancing of interests test where there is no apparent facial discrimination. Compare *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed. 2d 514(1977) with *Pike v Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed. 2d 174(1970), *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed. 2d 91(1978); *Archer Daniels Midland Co. v. State*, 690 P.2d. 177, 185 - 187 (Colo. 1984).

The product classification provisions do not constitute discrimination against interstate commerce and, therefore, are not subject to the "per se" test. The beverage which qualify under the product classification provisions are not limited to beverages produced from crops grown only in Florida nor to beverage bottled only Florida. §§564.06(2), (3), (4) and 565.12(1)(b), (2)(b) Fla. Stat. (1985). Instead, the classification is available to all beverages produced from sugarcane, citrus and the grape species wherever grown, and wherever the alcoholic beverages is (sic) manufactured and bottled. The classification is further available to beverages made from concentrates or by-products such as molasses, rather than beverages made from raw crops. The incentive in the Florida market for alcoholic beverages produced from such crops and by-products is available whether the beverage is made from crops grown in Florida or made from crops grown elsewhere and whether bottled in Florida or bottled elsewhere. Any manufacturer, regardless of where located and whatever his source of the beverage base, may take advantage of the tax preference.

The product classifications are thus clearly distinguished from statutes considered in the line of cases invalidating taxation or regulatory laws which had the effect of providing economic protection to a state's local produce and commerce. In each of those cases, the laws under scrutiny had the obvious effect of granting a financial advantage exclusively to commerce within the state, to the disadvantage of commerce from other states; that is, the local industry enjoyed a benefit which was unavailable to competing out-of-state industry. E.g., *Bacchus*, *supra*, at 104 S.Ct. 3057 (beverage tax exemption only to locally produced beverages); *Boston Stock*

Exchange v. State Tax Comm'n., 429 U.S. 318, 97 S.Ct. 599, 607-608, 50 L.Ed. 2d 514 (1977)(tax reduction available only to transactions made on local stock exchange); *Miller v. Publiker Industries, Inc.*, 457 So. 2d 1374, 1375 (1984)(tax advantage only to gasahol made exclusively from ethanol produced from U.S. products). Those cases caution that their result "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry". *Boston Stock Exchange v. State Tax Comm'n*, *supra*, 97 S.Ct. at 610. *Accord*, *Bacchus Imports, Ltd. v. Dias*, *supra*, 104 S.Ct. at 3056. That permissible tax structuring is precisely what Florida has done with respect to the classification of beverages made from sugarcane, citrus, and the grape species and concentrates or by-products thereof for tax incentives. Those provisions do not allow economic incentives only to domestic Florida industries and therefore do not violate the Commerce Clause. The favorable tax classification is available to all alcoholic beverage manufacturers using specified agricultural products. The products are grown widely - though not universally - throughout the world. Concentrates and by-products, rather than raw products, may be used.

In order to hold that the product classifications, constitute discrimination against interstate commerce, one must accept the proposition that the Commerce Clause forbids granting tax preferences which benefit certain crops for use in manufacture unless those crops can be grown everywhere or unless all crops which might be used in making alcoholic beverages are treated the same. That is precisely the premise which Appellees advanced below. The centerpiece of their challenge to the classification provisions was that they purportedly discriminated, not against distributors or manufacturers of alcoholic beverages, but rather against growers of other agricultural crops which might be used in making alcoholic beverages in places where climate will not permit the growth of sugarcane and citrus.

That premise has several flaws. The most fundamental is that none of the Appellees are in the business of farming such agricultural crops. They thus are completely without standing to make that argument. They are not in competition for the marketing of raw agricultural products. They are makers and distributors of alcoholic beverages.

They thus may not be heard to complain of alleged injury to the interests of others. *E.g.* *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 483, 80 L.Ed. 688 (Brandeis J. concurring); *Eastern Air Lines, Inc. v. Department of Revenue*, 455 S. 2d 311, 317 (Fla. 1984).

Even if that doctrinal bar is ignored, the premise is fatally flawed. It is flawed because it tacitly depends upon the idea that the State must classify all alcoholic beverages together in order to comply with the Commerce Clause. That is demonstrably incorrect. It is elemental that in the field of taxation the States possess great latitude in making classifications. *E.g.*, *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590(1940); *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 21 S.Ct. 43, 46, 45 L.Ed. 102 (1900). *Eastern Air Lines, Inc. v. Department of Revenue*, *supra*; *Archer Daniels Midland Co. v. State*, *supra*. They may, for instance, classify airline transportation differently from rail and water transportation. *Eastern Airlines, Inc. v. Department of Revenue*, *supra*. They may classify small firms in the gasahol (sic) business differently from large firms in the same business without offending the Commerce Clause. *Archer Daniels Midland Co. v. State*, *supra*. They may do so although interstate commerce is thereby *affected*, so long as the class is not drawn so as to favor local commerce exclusively over interstate commerce. *Id.*

The flaw in Appellees' position is that it equates every tax differential or regulatory mechanism which affects interstate commerce with discrimination against interstate commerce. It reduces to the argument that any action which in any way affects the "free market" balance of competition between industries in different states is forbidden discrimination. That argument proves too much. First, regulation by a state aimed at bolstering the position of its local industry has been upheld, although it affects interstate trade in the process. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315(1943). *See also* *Archer Daniels Midland Co. v. State*, *supra*. Second, when the court cautioned in the *Boston Stock Exchange* case that states were not prevented by the Commerce Clause from "structuring their tax systems to encourage the growth of intrastate

commerce...", 97 S.Ct. 599 at 610, it was necessarily contemplating tax differentials which would tend to strengthen or encourage general commerce to which the state is adapted, so long as the differential does not favor local commerce exclusively. Third, if Appellees' position were correct, it would prevent the States from granting any tax incentive, no matter how local the concern giving rise to it. Under appellees' theory, Florida could not grant special tax classification to agriculture, because that might put Florida farmers in a better competitive position relative to farmers in a sister state. It is illogical to conclude that a State may directly enhance the market power of local industry by keeping prices up, yet may not grant tax incentives aimed at increasing production and use of certain articles generally, to a state's ultimate benefit.

This Court should hold that Florida's classification of products for favorable tax treatment does not constitute discrimination against interstate commerce, because those provisions are facially neutral and do not grant an advantage producers to (sic) Florida over producers of citrus, sugarcane and grapes in other state (sic), nor to Florida manufactures of alcoholic beverages made from those crops.

The provisions of §564.06(2), (3), (4) and §565.12(1)(b), (2)(b), are thus properly analyzed under the balancing-of-interest test. E.g., *Pike v Bruce Church, Inc.*, *supra*; *Parker v. Brown*, *supra*; *Archer Daniels Midland Co. v. State*, *supra*.

The product classifications easily pass muster under that test. They are rationally related to the legitimate state interest of enhancing the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing. Without question, those provisions may affect commerce by increasing the use of sugarcane and citrus in the manufacture of beverages. But that effect is not a violation of the Commerce Clause. The fact that some crops used in the interstate production of alcohol may be displaced by other crops grown and sold in the interstate market does not constitute an undue burden on interstate commerce. See *Archer Daniels Midland Co. v. State*, *supra*; See also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 601 S.Ct. 715, 66 L.Ed. 2d 715(1981). Nor is a

temporary displacement due to market adjustment an impermissible burden on commerce. *Id.*

POINT II

THE CRITERIA FOR DISALLOWANCE OF PRODUCT EXEMPTIONS IN §§564.06(9) AND 565.12(1)(C), (2)(C) DO NOT FACIALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE AND ARE VALID UNDER THE BALANCING TEST

The trial court may have intended that the disqualification provisions, rather than the product classification provisions, caused a Commerce Clause problem with the tax preferences. However, a facial analysis of the disqualification provisions fails to support such a ruling and this record is insufficient to support summary judgment on an as-applied theory. See Point III, *infra*.

The disqualification provisions do not facially discriminate against interstate commerce. They do not impose a burden on interstate alcoholic beverage manufacturers as a class. Just as in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978) and *Archer Daniels Midland Co. v. State*, *supra*; on the face of these statutes it is equally likely that any shift in Florida's market would be from one foreign manufacturer to another as from foreign manufacturers to Florida manufacturers. The trial court erred, therefore, if its ruling is construed as striking down the tax preference under a "per se" analysis.

Nor does a facial analysis of the disqualification provisions under the balancing test support the trial court's summary judgment.

It must be remember that the price for encouraging use of the use (sic) of sugarcane, citrus and the grape species in alcoholic beverage production is the loss of tax revenues needed by the State. The legislature thus made the policy decision, embodied in the disqualification provisions, that it was not in the public interest to trade tax dollars for encouragement of industry in cases where alcoholic beverages were already benefitting from incentives in the

manufacturing jurisdiction. The rationality of that policy choice is clear. Why pay in lost taxes to accomplish an objective in cases where it is being fostered already? The local benefit is the preservation of the local tax base. The burden on interstate commerce has not been shown by Appellees to be significant. See *Archer Daniels Midland Co. v. State*, *supra*, at 187. There is no allegation in these cases, let alone conclusive proof, that the disqualification provisions would bar the sugarcane or citrus products of manufacturers for which Tampa Crown, Florida Beverage and McKesson distribute from taking advantage of the tax preference or that they would bar Brown-Forman's products. On the other hand there is evidence which shows that the disqualification provisions would not bar the wine manufacturers of Virginia from taking advantage of the tax preference. Thus, the statute cannot be said to be facially invalid. *Voce v. State*, 457 So. 2d 541 (Fla. 4th DCA 1984).

POINT III

THE LOWER COURT DID NOT ENTERTAIN AN AS-APPLIED CHALLENGE AND THE RECORD WOULD NOT SUPPORT SUMMARY JUDGMENT UNDER AN AS-APPLIED ANALYSIS

The trial court explicitly declined to treat the appellees' challenges to the statutes under an as-applied analysis. Yet, at bottom, that is precisely the sort of argument upon which Appellees heavily relied below. However, these cases were so rushed to judgment by Appellees that the record is wholly inadequate to support summary judgment if bottomed on the theory that the statutes' practical effect constitutes discrimination although they do not do so on the face of the matter.

It bears repeating that only Brown-Forman is a manufacturer of alcoholic beverages. The remaining Appellees function as wholesale distributors. They buy beverages of all types from various manufacturers and resell them to retail outlets. Nowhere in the complaints filed by Tampa Crown, Florida Beverage and McKesson is there any allegation that they do not distribute citrus-or-sugarcane-based beverages. Indeed the record shows that they do. Nowhere in

the complaints of Tampa Crown, Florida Beverage or McKesson is there any allegation that the manufacturers, whose sugarcane products or citrus products they distribute, have applied for an exemption license and been denied it by reason of the disqualification provisions. Nowhere in the record is there any allegation or proof that Tampa Crown, Florida Beverage or McKesson is barred from distributing products of manufacturers which do hold exemption certificates. In fact, this record affirmatively shows that Florida Beverage deals in and distributes wines and distilled spirits which receive tax preferences. This record affirmatively show that Tampa Crown refuses to deal in products which currently receive tax preferences, not because the law on its face or in practical operation prevents it, but because the law on its face or in practical operation prevents it, but because Tampa Crown chooses otherwise. Thus, the factual inferences in this record are wholly in conflict with the conclusion that the statutes in practical effect discriminate against the business of wholesale liquor distributors.

We are left, then, with the contentions of the one manufacturer in these cases: Brown-Forman. The record shows that Brown-Forman applied, as a manufacturer, for tax preference on its wine cooler product know as "California Cooler". Tax preference was denied; but it was denied because the product was made from crops not classified for tax preference, not because of the disqualification provisions of section 564.06(9), Florida Statutes. R. ____, App. 251 - 262. Thus there is no evidence in this record from which the trial court could have concluded that the practical effect of the disqualification provisions is to discriminate against interstate commerce and to grant a direct competitive advantage to Florida agricultural producers or beverage manufacturers, let alone sufficient evidence to conclude that there is no material fact in dispute on that issue. Moreover there is conflict in this record as to whether Brown-Forman could indeed benefit from the product exemption.

POINT IV

THE GRANTING OF SUMMARY JUDGEMENT WAS ERROR
SINCE APPELLANT (SIC) WAS NOT PROVIDED AN ADEQUATE
OPPORTUNITY TO COMPLETE DISCOVERY AND MARSHAL
EVIDENCE

It is reversible error for the trial courts to award summary judgment when a party, through no fault of its own, has not completed discovery. *E.g.*, *Moore v. Freeman*, 396 So.2d 276 (Fla. 3d DCA 1981); *Commercial Bank of Kendall v. Heinman*, 322 So.2d 564 (Fla. 3d DCA 1975).

The cases below were filed sequentially. The summary judgment hearings were conducted in McKesson and in Brown-Forman within 70 and 48 days, respectively, of the filing of their complaints. The trial court never consolidated the cases, but treated them informally as though they were consolidated. That approach is understandable, given the Court's announced intention to entertain the cases only on a facial analysis of the statutes' text. It worked to the prejudice of DABT, however, under the circumstances.

DABT raised a challenge below to the standing of Tampa Crown, Florida Beverage and McKesson. DABT asserted that those parties lacked taxpayer standing, since they could not gain as taxpayers by the striking of the exemptions, and since the economic burden of the beverage tax was passed on to their customers. DABT asserted that those parties had no standing to challenge the exemptions based upon economic injury, because their business as distributors were not harmed by the exemptions. Finally DABT asserted as to Tampa Crown, Florida Beverage and McKesson, that they lacked standing to challenge the disqualification provisions of the statutes. Those defenses were at issue and are supported by both Florida and federal precedents. *E.g.*, *Ashwander v. Tennessee Valley Authority*, *supra* (courts will not consider constitutionality of a statute on complaint of one not injured by its operation); *Dimond v. District of Columbia*, 618 F. Supp. 519, 524 (D.C.D.C. 1984) rev'd in part on other grounds,

792 F.2d 179 (D.C. Cir. 1986)(standing to challenge portions of a statute does not confer standing to challenge other portions without proof that those portions injure plaintiff); *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984).¹¹ Nor are those defenses academic; for, if proven, no party below would have standing to challenge §565.12, Florida Statutes.

DABT embarked upon discovery to show that, for example, McKesson had passed on the financial burden of the tax and was not injured, as an alcoholic beverage distributor, by reason of the operation of the exemptions. Nearly all of DABT's discovery in that regard was frustrated by objections from McKesson, and inadequate time was available to prepare and present motions to compel, much less to obtain the requested discovery, prior to the court's entertaining motions for summary judgment.

¹¹ *Bacchus v. Dias* is not conclusive of the standing issue. The Hawaii statute challenged in *Bacchus* granted an automatic exemption for locally produced alcoholic beverage products. Unlike Hawaii's law, the Florida statutes do not create an automatic exemption. Florida requires that a manufacturer take affirmative action to obtain the exemption for its products and grants the exemption to a manufacturer's product. Further, Florida's statute does not limit the availability of the exemption to locally produced beverages. Insofar as Appellees attempt to litigate as surrogates for manufacturers' interests, there is a ripeness problem in this case which was not before the court in *Bacchus*. Appellees did not prove that Florida's statutes uniformly prohibit all out-of-state manufacturers from obtaining product exemptions. If any manufacturer may obtain the product exemptions, then the statutes are facially valid, *Voce v. State*, 457 So.2d 541 (Fla. 4th DCA 1984), and Appellees' claims, as surrogates for such manufacturers, are "as-applied" challenges. Such challenges are not ripe for judicial review until application for the licenses has been made and the licenses have been denied. *Division of Alcoholic Beverages & Tobacco v. Ashbury*, 460 So.2d 1026 (Fla. 4th DCA 1984); *Florida Bar Owners, Inc. v. Department of Business Regulation*, 440 So.2d 15 (Fla. 1st DCA 1983); *Grady v. Department of Professional & Occupational Regulation*, 402 So.2d 438 (Fla.3d. DCA 1981). Moreover, the standing issue in *Bacchus* was raised for the first time on appeal. There was no consideration given to whether the wholesale distributors in that case would have had standing if, as taxpayers, they passed the tax on and, as distributors, they suffered no injury from the operation of the exemptions.

On the merits, with the little time available, DABT did manage to establish that sugarcane and citrus are widely grown, and are not anywhere near to being crops exclusive to Florida. DABT did *not* have the opportunity to pursue other factual matters which would bear directly upon the validity of the tax exemptions under the balancing test. For example, Brown-Forman asserted that using the grape species to make its wine coolers would be prohibitively expensive, since the grapes are not presently grown in California. Lines of inquiry remained open as to that assertion: (1) Does Brown-Forman want to use the tax-preferred substances in the coolers it makes? (2) If so, what prevents Brown-Forman from bringing into California the grapes or citrus in concentrated form? (3) What prohibits Brown-Forman from using wine from citrus, which abounds in California? (4) Can the grape concentrates not be shipped economically, as orange juice concentrate now is, for use in manufacture(?) Further, proof that citrus concentrate and molasses are, in present practice, shipped throughout the nation in a economical fashion which permits its use in further processing would surely be relevant on the issue of whether the classification of citrus and sugarcane for favorable tax treatment constitutes an excessive burden on commerce. Yet DABT was foreclosed from pursuing those lines of inquiry by the premature consideration of Appellees' summary judgment motions, complicated by the multiplicity of issues raised by the various complaints filed.

As a result, each Appellee had the opportunity to carefully prepare its position prior to filing suit. DABT, however, was rushed to judgment on complex issues with inadequate time to pursue discovery on relevant factual issues.

DABT respectfully submits that granting summary judgment to Appellees in these circumstances was prejudicial error and reversal is in order.

POINT V

THE TRIAL COURT ERRED BY REFUSING TO DISMISS THE COMPLAINT OF BROWN-FORMAN CORPORATION

DABT moved the trial court to dismiss Brown-Forman's complaint because Brown-Forman, prior to the institution of this action, had chosen to appeal the denial of its exemption certificate application regarding the "California Cooler" to the First District Court of Appeal and was therefore precluded from litigating the same issue simultaneously in circuit court. The trial court denied that motion. R. ___, App. 267 - 272.

The Court's ruling on DABT's motion to dismiss is directly in conflict with this Court's decision in *Keyhaven Associated Enterprises, Inc. v. Board of Trustees*, 427 So.2d. 153 (Fla. 1982). Brown-Forman, having chosen to challenge the constitutionality of §564.06 in the District Court on direct review under §120.68, Florida Statutes, is foreclosed from proceeding here to raise the challenges.

CONCLUSION

For the foregoing reasons DABT requests the the(sic) Court hold that the provisions of §§564.06(2), (3), (4), (10) and 565.12(1)(b), (2)(b), Florida Statutes (1985), do not constitute a facial violation of the Commerce Clause of the United States Constitution; hold that the provisions of §§564.06(9), 565.12(1)(c), (2)(c) Florida Statutes (1985), do not constitute a facial violation of that clause; hold that this record will not support summary judgment in favor of Appellees under an as-applied analysis of the statutes; and reverse the trial court's entry of summary judgment and partial summary judgment. In addition, DABT requests the Court to hold that entry of summary judgment in these cases was premature and therefore in error. As to Brown-Forman, DABT requests that the Court

reverse and remand with instructions to dismiss the complaint below.

Respectfully Submitted,

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SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 70,368

(Caption omitted in printing)

On Appeal from the District Court of Appeal,
First District, State of Florida, Case No. BS-402

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Authorities omitted in printing)

PRELIMINARY STATEMENT

Appellants filed an Appendix to their Brief in light of the inability of the Clerk of Court for the Circuit Court of the Second Judicial Circuit, In and For Leon County, Florida, to prepare a timely Record on Appeal, and cited to that Appendix in lieu of a Record. Appellee McKesson Corporation has also filed an Appendix for the same reason. McKesson's Appendix incorporates Appellants' Appendix and supplements their Appendix with additional documents. Thus, Appellee's Appendix, which retains Appellants' initial numbering, includes all Appellants' and Appellee's references. Appellee will cite in its Brief to documents in the Appendix: (A.____.)

STATEMENT OF THE CASE AND OF THE FACTS

Introduction

Plaintiff-Appellee-Cross-Appellant McKesson Corporation ("McKesson"), which is a distributor of alcoholic beverages in Florida, challenges the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985), which impose taxes on the distribution of alcoholic beverages.

McKesson maintains that the Florida statutes discriminate against interstate and foreign commerce in violation of the federal Constitution's Commerce Clause and Import-Export Clause and also encroach upon the federal government's exclusive power over foreign affairs.

McKesson submits this statement of the case and the facts because appellants' statements are incomplete.

The Revised Florida Products Exemption

Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), which declared a Hawaii liquor tax exemption for local products unconstitutional under the Commerce Clause, Florida's alcoholic beverage laws granted an excise tax exemption to beverages

manufactured and bottled in Florida from Florida products. (A. 1-3.) The similarity between the Florida law, sections 564.06 and 565.12, Florida Statutes (Supp. 1984) ("Florida Products Exemption"), and the unconstitutional Hawaii law prompted the Florida legislature to alter the language of the statute. (A. 386-485.)

During the 1985 Florida legislative session, the legislature enacted the Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). The legislature removed the word "Florida" from the sections and substituted language identifying certain agricultural products whose use would entitle the manufacturers and distributors to a tax break. The sections, one for wines, section 564.06, and one for distilled spirits, section 565.12, divide into three relevant parts. (A. 4-7A.)

First, the sections impose a per gallon tax on the alcoholic beverages that relates to the percentage of alcohol.

Second, the sections provide a tax exemption for wines and a tax preference for distilled spirits when the alcoholic content of the beverages is manufactured exclusively from certain designated products. The Florida statutes' designated products are all Florida products.

Florida, which cannot produce the grape species that grape producers generally produce for that manufacture of wine and wine coolers, *Vitis Vinifera*, has designated for preferential treatment the six grape species that Florida does produce for the manufacture of wine and wine coolers, *Vitis Rotundifolia*, *Vitis Aestivalis* ssp. *Simpsoni*, *Vitis Aestivalis* ssp. *Smalliana*, *Vitis Shuttleworthii*, *Vitis Munsoniana*, and *Vitis Berlandieri*. (A. 370-71.)

Florida, which is one of the few states to produce citrus and is the predominant producer of citrus, has designated for preferential treatment citrus fruits, citrus products and citrus byproducts.

(A. 375.) Florida, which is also one of the few states to produce sugarcane and is the leader in production of sugarcane, has designated for preferential treatment sugarcane and sugarcane byproducts. (A. 375.)

Third, the sections authorize the Division of Alcoholic Beverages and Tobacco to review the laws and programs of the applicant's home state or country to determine whether the state or country grants the applicant any economic advantage and to apply a set of provisions to take back the tax exemption or tax reduction ("Take Back Provisions"). §§ 564.06 and 565.12, Fla. Stat. (1985).

McKesson's Action

McKesson does business in Florida as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors. (A. 365-66.) McKesson, which is licensed under section 561.14, Florida Statutes (1985), has distributed domestic and imported alcoholic beverages at wholesale and has paid excise taxes on alcoholic beverages under sections 564.06 and 565.12, Florida Statutes (1985). (A. 365-66.)

On September 3, 1986, McKesson filed a Complaint in the Circuit Court, Second Judicial Circuit, Leon County, against the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and the Office of the Comptroller (together, "the State"), challenging Florida's alcoholic beverage tax as unconstitutional under the federal and state constitutions. (A. 30-60.) Jacquin-Florida Distilling Co., Inc. ("Jacquin") and Todhunter International, Inc. ("Todhunter"), two Florida manufacturers who profit from the Florida statutes' protectionist effect, intervened as defendants. (A. 302-04.)

McKesson in its Complaint prays that the Court declare that the Florida statutes violate the United States and Florida Constitutions and, accordingly, are void and unenforceable. McKesson also prays for a refund of taxes. (A. 30-40.)

On October 17, 1986, McKesson filed motions for partial summary judgment and for a preliminary injunction. (A. 306-492.) McKesson argued that: sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against interstate and foreign commerce in violation of the Commerce Clause; impermissibly involve Florida in foreign affairs and international relations; and the sections impermissibly discriminate against foreign imports in violation of the Import-Export Clause. (A. 306-492.)

On November 12 and 26, 1986, Judge Charles E. Miner, Jr. of the Circuit Court heard arguments. On March 20, 1987, the Court entered an Order that found that McKesson has standing to challenge the constitutionality of the tax statutes and that declared unconstitutional those portions of the statutes that grant tax exemptions or preferences. The Court's Order included a preliminary injunction that enjoined the State from enforcing the unconstitutional statutory provisions. The Court stated that its declaration of unconstitutionality would operate only prospectively. (A. 278-80)

On the same day, March 20, 1987, the State filed a Notice of Appeal, which automatically caused a stay of the Circuit Court's Order under Fla. R. App. P. 9.310(b)(2). (A. 285.) On April 15, 1987, McKesson filed its notice of cross appeal. (A. 561-62.) McKesson in its cross appeal challenges the Circuit Court's decision to restrict its declaration of unconstitutionality and thereby bar retroactive relief to McKesson.

On April 13, 1987, the District Court of Appeal, First District, certified that the case on appeal is of great public importance requiring immediate resolution by the Florida Supreme Court. On April 22, 1987, this Court accepted jurisdiction.

QUESTIONS PRESENTED

I. WHETHER MCKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

II. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

III. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

IV. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE.

V. WHETHER THE CIRCUIT COURT PROPERLY ENTERTAINED MCKESSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

VI. WHETHER, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, AS WELL AS FLORIDA LAW, MCKESSON IS ENTITLED TO A REFUND OF THE DIFFERENCE BETWEEN THE TAXES ON MCKESSON'S DISFAVORED PRODUCTS AND THE TAXES ON OTHERS' UNCONSTITUTIONALLY FAVORED PRODUCTS.

SUMMARY OF ARGUMENT

Under the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), McKesson has standing to challenge the constitutionality of the Revised Florida Products Exemption. McKesson, as an alcoholic beverage distributor, has paid excise taxes on its products to the State under the challenged statutes. Further, Florida's enforcement of the tax has adversely affected McKesson's property rights.

McKesson maintains that the Circuit Court correctly determined that the Revised Florida Products Exemption violates the United States Constitution's Commerce Clause.

The United States Supreme Court has declared that state statutes that either reveal a discriminatory purpose or cause a discriminatory effect are virtually *per se* invalid under the Commerce Clause. The Court has squarely established that the Commerce Clause forbids discrimination, whether forthright or ingenious. Therefore, this Court has a federal constitutional obligation to determine the legislature's true purpose in enacting the Revised Florida Products Exemption and, also, to determine whether the statutes, in their practical effect, discriminate against interstate commerce.

The Revised Florida Products Exemption's protectionist purpose makes the statutes unconstitutional. This Court's analysis of the statutes and their history will reveal that the Florida legislature intentionally designed the statutes to continue Florida's historic alcoholic beverage tax policies of protecting Florida products and industry. Appellants cannot contradict the evidence from the legislative history that the legislature sought to circumvent the holding in *Bacchus* and preserve the former Florida Products Exemption's protectionist effect.

The Revised Florida Products Exemption's practical effect -- a discrimination against interstate commerce -- also makes the statutes unconstitutional. The Florida statutes effectively tax the alcoholic beverage products from Florida and a few other states and countries at one rate and tax the products from the remaining state and countries at a higher rate. Although Florida may enact laws to encourage local industry, Florida may not protect local industry by imposing a discriminatory burden upon other states' and countries' industry. The Revised Florida Products Exemption imposes a discriminatory burden upon all other states and countries whose geography and climate do not permit them to produce the favored agricultural products. Moreover, the statutes' Take Back Provisions permit the State to discriminate further against interstate commerce by preventing out-of-

state manufacturers and distributors who use the Florida agricultural products from receiving the tax breaks.

Even if the Revised Florida Products Exemption did not have a protectionist purpose and effect and, thus, were not *per se* unconstitutional, the statutes still would violate the Commerce Clause because they impose an excessive burden on interstate commerce. The United States Supreme Court has noted that the Commerce Clause does not bar state legislation that affects interstate commerce only incidentally, that advances legitimate local interests, and employs the least burdensome alternative. However, the Revised Florida Products Exemption does not survive scrutiny under this standard. First, the statutes do not directly affect only local commerce and, thus, only incidentally affect interstate commerce. Rather, the tax scheme directly burdens out-of-state producers who do not grow the Florida products. Second, the statutes advance the illegitimate purpose of encouraging the sale of Florida products at the expense of non-Florida products. Third, the statutes do not employ the least burdensome alternative. Florida can effectively promote its industry without violating the Commerce Clause.

McKesson also maintains that the Revised Florida Products Exemption impermissibly involves Florida in foreign affairs and international relations. The Florida statutes' Take Back Provisions disrupt the federal government's exclusive jurisdiction over foreign affairs by requiring Florida to make determinations concerning other countries' activities. The statutes permit Florida to obstruct various federal trade programs. The Florida statutes interfere with the federal government's resolution of delicate international trade issues.

McKesson also maintains that the Revised Florida Products Exemption impermissibly discriminates against foreign imports and, thus, violates the United States Constitution's Import-Export Clause. The Florida statutes effectively impose a duty upon imports by discriminating against other countries' products and, under the Take Back Provisions, by authorizing the denial of tax preferences to foreign products based on their place of origin.

The Circuit Court properly entertained McKesson's motion for partial summary judgment. The Circuit Court realized that although the State suggested the existence of factual controversies, McKesson and the State did not disagree on the fundamental constitutional facts concerning the Revised Florida Products Exemption. The Circuit court properly concluded that the State had not, and could not, present a controversy on any genuine issue of material fact.

McKesson is entitled to an appropriate tax refund as a remedy for its constitutional injury as a result of Florida's discrimination. Florida law authorizes McKesson's recovery of taxes. The Circuit Court improperly barred retroactive relief to McKesson, which has timely pursued its challenge to the statutes.

ARGUMENT

I. McKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

McKesson has standing to challenge the constitutionality of the Revised Florida Products Exemption under the federal Constitution.

The United States Supreme Court, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), established that a liquor wholesaler has standing to challenge the constitutionality of a state liquor excise tax upon the wholesaler's products. The Court in *Bacchus* held that when a wholesaler must pay the tax on its products to the state, the wholesaler has standing to challenge the tax. *Id.* at 267.

This Court, in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), adopted a similar expansive view of standing in a case challenging the constitutionality of a Florida gasoline tax scheme. This Court held that a plaintiff has standing to challenge the constitutionality of a tax statute if enforcement of the statute adversely affects the plaintiff's personal or property rights, even if the plaintiff is not liable for the tax. *Id.* at 1375-76.

Under *Bacchus* and *Publicker*, McKesson plainly has standing to challenge the constitutionality of the Florida statutes. McKesson, as a distributor of alcoholic beverages, is liable for the tax. (A. 356-66.) Under sections 564.06 and 565.12, Florida Statutes (1985), McKesson, as a distributor has paid the excise taxes on its products to the State whether its customers have paid for products or not. (A. 366.) Moreover, McKesson's products, which did not receive the tax exemptions and preferences, have competed with other distributors' products, which did receive the tax exemptions and preferences. (A. 366-68.) As a result, McKesson has suffered economic losses. (A. 368.) Consequently, Florida's enforcement of the tax has adversely affected McKesson's property rights.

Appellants' attempts to question McKesson's standing in this case ignore the Supreme Court's decision in *Bacchus*.

Appellants argue that McKesson does not have standing to challenge the tax statutes either because McKesson is not a producer of agricultural products or because McKesson is not a manufacturer of alcoholic beverages. However, in *Bacchus*, in which McKesson was a plaintiff, the Supreme court acknowledged McKesson's standing to challenge suspect tax statutes even though the company did not claim to be either a producer or a manufacturer. *Bacchus Imports, Ltd. v. Diaz*, [sic] 468 U.S. 263, 266-67 (1984). A distributor who pays the unconstitutional taxes may attack the constitutionality of a state's attempt to favor its own parochial interests. *Id.* at 267.

Appellants also contend that McKesson does not have standing to challenge the tax statute because it could receive the tax exemptions and preferences by selling the favored products. The majority in *Bacchus Imports, Ltd. v. Diaz*, [sic] 468 U.S. 263 (1984), rejected a similar argument suggested by the dissent. The Supreme Court ruled that the taxpayer who sells disfavored products has the financial interest to litigate the constitutionality of a state's statutes.¹

¹ Even if appellants' argument that McKesson must establish that its distribution of products implicates the Take Back Provisions were accurate, McKesson, in fact, does distribute products that would qualify for the Revised Florida Products Exemption's tax preference but for its Take Back

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

The Commerce Clause enforces our overriding national interest in free, unrestricted trade among the states through a national common market. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). The Commerce Clause federalizes regulation of foreign and interstate commerce and restricts internecine actions among the states. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34, 69 S.Ct. 657, 93 L.Ed. 865 (1949). Thus, each state cannot "legislate according to its estimate of its own interests [and] the importance of its own products." *Id.* at 533 (quoting Story, *The Constitution*, §§ 259, 260.)

The United States Supreme Court has adopted a two-tiered approach in reviewing Commerce Clause cases. Where state legislation effects economic protectionism, the Court has declared a "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Where state legislation advancing legitimate local interests affects interstate commerce only incidentally, and employs the least burdensome alternative, the Court will permit the law. *Id.*

Provisions. McKesson distributes Mt. Gay Rum from Barbados. (A. 367-68.) Mt. Gay Rum, a sugarcane product, would qualify for the tax preference under section 565.12 (1)(b), Florida Statutes (1985), but for the Take Back Provisions.

Barbados, as a beneficiary country under the terms of the Caribbean Basin Economic Recovery Act, 19 U.S.C.A. § 2702 (West Supp. 1986), and Presidential Proclamation 5133 of November 30, 1983, receives trade benefits from the United States for its alcoholic beverages. Under the Act, Barbados cooperates with the United States in administering the trade benefits. See 19 U.S.C.A. § 2702 (c)(11). In addition, a Barbados government agency, the Barbados Export Promotion Corporation, provides economic advantages to Barbados rum manufacturers. Therefore, under the Take Back Provisions, McKesson's Mt. Gay Rum from Barbados, which would otherwise qualify for a tax preference, is ineligible to receive Florida's unconstitutional tax break.

The Revised Florida Products Exemption's scheme of tax exemptions and preferences fails on both levels of analysis.² Florida's attempt to protect its local commerce at the expense of interstate competition offends the cardinal rule of Commerce Clause jurisprudence that no state may erect a tax scheme that provides a direct commercial advantage to local business by discriminating against interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984). The Commerce Clause does not allow Florida to advance its parochial interests at our national economy's expense.

A. The Revised Florida Products Exemption Constitutes Economic Protectionism and, Therefore, is Unconstitutional.

This Court may find economic protectionism either in discriminatory purpose or in discriminatory effect. Either condition is sufficient to condemn a statute. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 270. The "evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. at 626. The Florida legislation is demonstrably protectionist and discriminatory in both its purpose and its effect.

1. The Florida Legislature Designed the Florida Laws to Protect Florida Commerce from Interstate Competition.

This Court must examine the Florida statutes for discriminatory purpose. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270

² Appellants' suggestion that the Constitution's Twenty-first Amendment, which allows Florida to regulate the consumption of alcoholic beverages within the state, is a "factor" in this case is frivolous. Appellants acknowledge repeatedly that the Florida legislature passed the Revised Florida Products Exemption in order to increase the consumption of alcoholic beverages that use Florida's products. The supreme Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), concluded that the Amendment did not save Hawaii's discriminatory tax scheme, noted that the "central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." See also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. ___, 106 S.Ct. 2080, 90 L.Ed.2d 552, 563-64 (1986).

(1984); *Philadelphia v. New Jersey*, 437 U.S. at 626. Thus, as a matter of federal constitutional law, this Court must consider not only the Florida statutes' language but also their legislative history to determine the Florida legislature's true purpose in enacting the statutes.³

The United States Supreme Court, in reviewing challenges to state statutes on Commerce Clause grounds, has focused on legislative history to identify the state legislature's intent. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42, n.8, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (state Senate committee testimony supported the inference that the legislature had passed a challenged provision in response to the pleas of local businesses seeking protection from competition); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law in Commerce Clause challenge).

Moreover, the Supreme Court in Commerce Clause cases has indicated that courts cannot restrict their review of state statutes to the language of the statute. As the Court stated in *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 85 L.Ed. 275 (1940), "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." Thus, even if the Florida statutes' language appeared non-discriminatory, this Court would need to explore the legislative history to determine the legislature's true purpose. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-328 (1977) (legislative history, including a governor's statements, may establish legislative purpose); cf. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (legislative history is a source for determining whether an ostensibly neutral statute is racially discriminatory).

³ Contrary to Appellants' suggestion, McKesson is not invoking legislative history to illuminate the statutes' construction, but rather to reveal the legislature's purpose in enacting the challenged statutes. Compare *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983).

Upon review, the Revised Florida Products Exemption's history reveals the Florida legislature's protectionist purpose for the tax scheme and is, therefore, critically relevant to this Court's determination of the constitutionality of the challenged law. The Florida legislature, intending to protect certain Florida agricultural products, and to protect the manufacturers using those products, enacted the Revised Florida Products Exemption. From among the legion of agricultural products used for the making of wines and distilled spirits, the legislature decided to favor citrus, sugarcane, and certain species of grapes by granting these products a commercial advantage on the market. In its selectivity, the legislature knew that only Florida and a few other states produce the favored agricultural products in commercial quantities.

Thus, this Court's review of the Florida statutes' legislative history will reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism.⁴ Two dominant themes emerge.

First, the Florida legislature intended the new statutory scheme to retain the protectionist character of the former Florida Products Exemption, which unconstitutionally discriminated in favor of Florida manufacturers and distributors and Florida products.

Representative Jones, a sponsor of the new legislation, explained the purpose of the Revised Florida Products Exemption to three Florida House of Representatives Committees. On April 23, 1985, before the House Committee on Regulated Industries and Licensing, Mr. Jones stated:

The legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida

⁴ McKesson asked the Circuit Court to take judicial notice of the legislative history. (A. 381-492.) This Court, of course, may also take judicial notice. Section 90.202 of the Florida Evidence Code does not limit judicial notice to trial courts. *See also* Fla. Evid. Code § 90.207 (1986) (Sponsors' note, citing cases).

products will be used in the manufacture of these products, and that they will be sold here and throughout the country I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

(A. 387.) Before the House Committee on Appropriations, Mr. Jones stated: "What we're doing here is to retain those 300 jobs that have been developed in Florida as a result of our policies towards Florida products." (A. 423.) Representative Hargrett, a co-sponsor of the legislation, testified before the same Committee:

Chairman, ladies and gentlemen of the Committee, I just wanted to say this bill is necessary in order to preserve the home state wine industry that we've begin [sic.] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill.

(A. 426-27.) During Mr. Jones' testimony before the Appropriations Committee, the Chairman commented that representatives from the grape industry had contacted him. Mr. Jones assured him that the legislation would in fact "take care of them." (A. 428.) Before the House Committee on Finance and Taxation, Mr. Jones stated:

I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. . . .

With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits.

(A. 415-18.)

Before the Florida Senate Commerce Committee on May 9, 1985, Senator Crawford, the Senate sponsor, reiterated the same theme:

Frankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. . . .

It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State.

(A. 433.) Before the Florida Senate Finance and Taxation Committee on May 14, 1985, Senator Crawford stated that the bill "maintains the status quo on the current exemption that we have." (A. 499.)

On the House floor, during the May 18, 1985 debate of the Revised Florida Products Exemption bills, Mr. Jones noted that Florida had "granted a benefit to the distillers in Florida using Florida products for many years." (A. 461.) Mr. Jones explained that while the United States Supreme Court's decision in *Bacchus* had disturbed the status quo, the sponsors did not intend to abandon the tax exemption. "We're simply trying to protect what was in place prior to this Supreme Court decision." (A. 461-62.) During the House floor debates on May 28, 1985 and May 31, 1985, Mr. Jones referred to the legislation as "Florida Products bills." (A. 460-69.)

Second, the Florida legislators hoped to circumvent the Commerce Clause holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), by continuing to favor Florida commerce. During the the [sic] Senate Commerce Committee deliberations, the Chairman responded to another senator's concern that, while encouraging the use of Florida products, the tax exemptions might also encourage the use of out-of-state citrus, grapes, and sugarcane:

[t]he reality is we have a way constitutionally of giving support to industry that would locate in this state, would give jobs to this state and would pay taxes in the state and the way we're doing it it would meet the criteria established by the Supreme Court and all the practical effects in reality is going to accomplish exactly what we want. We could argue theory but I think reality is much more important.

(A. 443-44.) Senator McPherson added --

[w]hat Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that.

(A. 444-45.) Immediately before the Senate Committee voted to adopt the bill, Senator McPherson concluded:

[t]he way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida.

(A. 446.)

During the Florida Senate Finance and Taxation Committee meeting on May 14, 1985, Senator Grant objected that the sponsors of the Revised Florida Products Exemption intended to maintain the protection of the Florida alcoholic beverage industry but would not continue to protect the Florida gasohol industry, and argued for the protection of both industries:

Senator, I thought that one bill addressed, that both bills in fact address the same point. I thought it was the production of

jobs, the continuation of use of Florida products without saying so because that was a constitutional issue . . . I wonder why we want to continue one exemption and remove another.

(A. 450-51.) Senator Crawford, in response, explained that the sponsors had found disagreement among Florida producers regarding how the legislature should proceed with gasohol legislation, but no such disagreement among Florida producers regarding how the legislature should proceed with alcoholic beverage legislation. (A. 451.) Senator McPherson then added this candid observation:

I think the difference is that by exercising your good bill here will help Florida people, Florida businesses and the exemption of the gasohol the way it was so written was allowing foreign people to take advantage of it. It's the philosophy as far as exemptions is probably the same, but it's who gains is what's important.

(A. 452.)

Thus, in essence, the legislature altered the former Florida Products Exemption but maintained the protectionist purpose and effect in the new law.⁵

2. The Florida Law Effectively Protects Florida Commerce from Interstate and Foreign Competition.

Florida's producers and other states' and countries' producers compete for sales to manufacturers of alcoholic beverages. With respect to wine and wine coolers, Florida's producers can grow the

⁵ Appellants cannot refute this legislative history. Only Todhunter suggests that the legislative history offers a competing legislative purpose for the statutes, and Todhunter does not offer a statement from one of the legislative sponsors or even from one of the legislators. Rather, Todhunter relies on a quote from a lobbyist representing the Wine and Spirits Distributors of Florida. (Todhunter's Brief at 11.)

species that most consumers prefer, *Vinifera*, but can grow the Florida species. They compete with other states' and countries' producers, who can grow the *Vinifera* species. (A. 369-72.) With respect to liquor, Florida's producers of citrus and sugarcane compete with other states' and countries' producers, who frequently cannot grow citrus or sugarcane but can grow alternative crops. (A. 374-80.)

The Revised Florida Products Exemption favors Florida's producers in the competition in interstate and foreign markets and prevents other states' and countries' producers from competing on equal terms. With respect to wine and wine coolers, the Florida statute counters Florida's inability to produce the preferred *Vinifera* species and other states' and countries' ability to produce the preferred species by providing tax exemptions only for species which Florida can produce. (A. 369-72.) With respect to liquor, the Florida statute builds on Florida's historic preeminence in the production of citrus and sugarcane and many other states' and countries' inability to produce citrus and sugarcane by providing tax preferences only for citrus and sugarcane. (A. 374-80.)

In other words, Florida has decreed that its grape, citrus, and sugarcane products shall have a commercial advantage over certain other states' and countries' producers in the competition for sales to the manufacturers of alcoholic beverages. Thus, the manufacturers who use the Florida law's favored products obtain a commercial advantage from their lowered cost as a result of the tax breaks. (A. 374-80.) Such anticompetitive protectionism clashes with "the common market created by the Framers of the Constitution." *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, Inc.* 424 U.S. 366, 380, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976).

The Supreme Court has invoked the Commerce Clause to restrict the means by which a state may constitutionally seek to promote its own industry. The Court has repeatedly applied Justice Cardozo's formulation of the rule:

Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing

an economic barrier against competition with the products of another state or the labor of its residents.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527, 555 S.Ct. 497, 79 L.Ed. 1032 (1935).

In reviewing a state's restrictions on interstate commerce, the Supreme Court looks to the restrictions' practical effect. For example, in *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), the Court found that a city regulation, which on its face purported to advance health and safety, had the practical effect of discriminating against interstate commerce, rendering the regulation unconstitutional. The Court in *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), stated:

The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

Id. at 455-56. See also *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (Court must focus on state tax provisions' "practical effect"); *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (Court must assess state tax "in light of its actual effect"); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) (the Court's "principal focus of inquiry must be the practical operation of the statute").

The Florida Supreme Court has recognized the United States Supreme Court's approach. For example, in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 317 (Fla. 1984), the Florida Supreme Court held unconstitutional a statute that discriminated against interstate commerce by providing a commercial advantage to local commerce. The Court recognized that the statute's practical effect was the focus of inquiry. *Id.* at 320.

The Revised Florida Products Exemption, which establishes a preferential trade area for the designated products, offends the Commerce Clause through its practical effect. For example, the winemaker who uses a grape species that does not grow in Florida incurs higher taxes than a winemaker who uses Florida grapes. As another example, the vodka manufacturer who uses Maine potatoes incurs higher taxes than the vodka manufacturer who uses Florida citrus. As another example, the brandy distiller who utilizes Barbados beet sugar rather than a prime Florida agricultural product, sugarcane, does not qualify its product for an economic advantage. Thus, the Florida act disrupts the interstate movement of other states' and countries' products that do not receive the Florida tax break and that compete in the Florida market with Florida's products. (A. 374-80.)

The United States district court in *Mapco, Inc. v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979), declared unconstitutional an Ohio statute imposing taxes on coal whose practical effect resembled the Florida law's effect. The Ohio legislature did not expressly restrict tax advantages to Ohio coal, but subjected high-sulfur coal to a lower tax rate than low-sulfur coal. The vast bulk of Ohio's coal production was of high-sulfur. The court found that the tax disadvantaged the interstate movement of low-sulfur coal and thereby constituted a *prima facie* violation of the Commerce Clause. The court noted: "[s]urely a competent purchasing agent of a steam-electricity generating utility would consider this . . . price differential when deciding whether to purchase Ohio high-sulfur coal or Kentucky low-sulfur coal." *Id.* at 408.

Moreover, the discriminatory Florida tax statutes divest the out-of-state growers of any competitive advantages and confer advantages to local growers. Florida, which cannot grow *Vitis Vinifera*, the grape species that consumers usually prefer, has decided to discriminate against *Vinifera* and subsidize the grape species it can produce. (A. 369-72.) Florida, whose predominant products face competition for markets from other states' products, has attempted to affect many other states' ability to compete. (A. 375-77.)

The Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed. 2d 383 (1977), found unconstitutional a North Carolina statute that had a similar practical effect. The North Carolina statute interfered with the prevailing free market forces by boosting the competitive advantage of local growers and dealers at the expense of out-of-state growers and dealers. *Id.* at 350-52. The statute offered the North Carolina apple industry "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." *Id.* at 352. The Florida tax scheme exhibits the same defect.

Under the Commerce Clause, Florida cannot pass a law decreeing that products from Florida and a few other states will be taxed at one rate and products from the remaining states will be taxed at a higher rate.⁶ The Revised Florida Products Exemption has the same practical effect. As the court stated in *Mapco, Inc. v. Grunder*, where in practical operation a state's statute favors its own products, it "is no less invalid because it is not cast in terms of location. The commerce clause forbids both forthright and insidious discrimination." 470 F. Supp. at 410 n.14.

Appellants repeatedly invoke *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), for the proposition that a state may enact laws that have the purpose and effect of encouraging local commerce, but ignored that the Commerce Clause circumscribes the means by which a state constitutionally may seek to promote its own commerce. The Supreme Court in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 877 n.6, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), summarized the *Bacchus* holding:

⁶ In *CTS Corp. v. Dynamics Corp. of America*, 55 U.S.L.W. 4478 (April 21, 1987) (Nos. 86-71, 86-97), the Supreme Court upheld an Indiana law concerning corporate takeover attempts. The Indiana law, which applies only to Indiana corporations, affects out-of-state offerors, seeking to acquire an Indiana corporation, and local offerors equally. The Revised Florida Products Exemption does not affect out-of-state producers and local producers equally, but rather discriminates against a majority of out-of-state producers in order to promote the producers of Florida's products.

Thus, in *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry" [468 U.S. 263, 271 (1984)], we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business [*id.* at 278].

Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. The tax statutes' purpose is illegitimate, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443, 25 L.Ed. 743 (1880).

The State admits that the Florida legislature sought to increase the market share of Florida Products, while it sought to maintain Florida's excise tax base. (State's Brief at 2, 27-28.) Florida has accomplished its objectives by disproportionately imposing its alcoholic beverage excise tax burden on out-of-state commerce, while granting tax breaks to local commerce. In other words, Florida's tax scheme requires interstate commerce to fund Florida's protectionism.

Appellants argue that the Florida statutes do not offend the federal Constitution because the statutes do not discriminate against producers in some states and countries that are able to produce the Florida products. In effect, appellants ignore that the constitutional issue is not whether the Florida statutes effectively discriminate against commerce from *every* other state and country, but whether it effectively discriminates against commerce from *any* other state or country.

When the United States Supreme Court, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), reviewed a North Carolina statute that discriminated against states that used more

more rigorous grading standards for apples that North Carolina used, the Supreme Court specifically noted that the statute did not discriminate against all states that exported apples to North Carolina but only against seven other states that had their own grading systems. The Supreme Court rejected North Carolina's argument that its statute did not distinguish states by name and ruled that the statute, which primarily imposed a barrier against Washington's apples, violated the Commerce Clause.

When the United States Supreme Court, in *Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982), reviewed a Nebraska statute that discriminated against states that did not grant reciprocal rights to transport ground water, the Supreme Court determined that the statute, which did not discriminate against all states, operated as a barrier to commerce between Nebraska and Colorado. The Supreme Court declared the Nebraska statute unconstitutional under the Commerce Clause. See also *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

When this Court, in *Miller v. Publiker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), reviewed the finding that a Florida statute discriminated against other countries (but not other states) that produced alcohol for gasohol, this Court found that the fact that the statute did not discriminate against other states did not save the law from constitutional attack. This Court declared unconstitutional the Florida statute, which imposed a barrier against only foreign countries' products, under the Commerce Clause and the Import - Export Clause.

When the Supreme Judicial Court of Maine, in *Private Truck Council of America v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986), cert. denied, 106 S.Ct. 1997, 90 L.Ed.2d 677 (1986) reviewed a Maine statutes that discriminated against states that imposed certain taxes on Maine trucks, the Court specifically rejected Maine's argument that the statute's discriminating "against only some, not all, foreign-registered trucks" made the statute constitutional. The Court noted that "Balkanization, even through [sic] only partial is still

Balkanization" and declared the statute unconstitutional under the federal Commerce Clause. *Id.*

Thus, in considering McKesson's challenge, this Court cannot sustain the Florida statutes simply because the Florida legislature permitted a few other states, whose geography and climates allow them to produce the favored products, to petition Florida to participate in the discrimination against the disfavored products. Rather, this Court must declare the Florida statutes unconstitutional because the statutes discriminate against commerce from the majority of states whose geography and climate do not permit them to produce the favored agricultural products. As federal and state courts consistently have decided in similar cases, the Florida statutes' not discriminating against every other state and country simply does not redeem the statutes' unconstitutional discrimination against some states and countries.

The Florida law's Take Back Provisions further the discrimination against interstate commerce. The provisions prevent out-of-state manufacturers and distributors who do in fact use the favored products from receiving the tax breaks. The law grants the Florida Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, the discretion to determine whether the state, territory, or country in which the alcoholic beverage is manufactured or bottled: (1) "discriminates" against alcoholic beverages manufactured or bottled outside of its boundaries; (2) provides "economic incentives or advantages" exclusively for alcoholic beverages produced within its boundaries; or (3) provides "export subsidies" for agricultural products used in making the alcoholic beverages. Upon an affirmative finding by the Florida agency with respect to any of the above conditions, Florida withholds the tax breaks.⁷

The Florida legislature may have been too clever in designing the Take Back Provisions to prevent out-of-state producers from

⁷ The Supreme Court has stated that "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080, 2086 n.5 (1986).

competing on even terms in Florida. Predictably, Florida has not turned the Florida statutes against local interests by ruling that the law, itself, constitutes Florida discrimination and, therefore, that Florida firms do not qualify for the tax exemption. But, certainly, New York might construe the Florida law as discriminatory, warranting reciprocal discrimination against Florida firms. Expanding the scenario, each state might allow its agencies to scrutinize other states' laws and, upon a finding of discrimination, authorize discrimination in turn against the offending state. The Commerce Clause was designed to prevent this very kind of commercial warfare. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949).

Florida cannot save its discriminatory law with the assertion that the law actually promotes free interstate commerce. Florida stands the Commerce Clause on its head by assuming that it authorizes a state to erect trade barriers in response to trade barriers.

In *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976), in which a Louisiana milk producer challenged a Mississippi regulation requiring certain trade reciprocity, the Supreme Court rejected Mississippi's argument that its reciprocity requirement encouraged free trade among states by forcing a state that had been protecting its own producers to eliminate trade barriers. Where a state unconstitutionally burdens interstate commerce by protecting its own producers from competition, "the Commerce Clause itself creates the necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause." *Id.* at 380.

Similarly in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), a challenge to Nebraska's reciprocity requirement for the interstate transportation of ground water, the Court held that the reciprocity provision erected an impermissible barrier to interstate commerce and could not survive the "strictest scrutiny" reserved for discriminatory legislation. *Id.* at 957-58. "The reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce." *Id.* at 958 n.18. Thus, in the words of the Supreme Judicial Court of Maine, a "state may not violate

the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation." *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986).

Interestingly, Florida rejected Canandaigua Wine Company's application for the tax exemption after determining that New York, Canandaigua's home state, discriminated in favor of New York wine products. *In re Canandaigua Wine Co. Inc.*, January 8, 1986, Final Order, (Fla. Div. of Alcoholic Beverages and Tobacco 1986). The particular New York legislation faced a challenge in court on constitutional grounds. In *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y. 1985), *aff'd and modified*, 761 F.2d 140 (2d Cir. 1985), the court applied the Commerce Clause to find that the New York Alcoholic Beverage Control Law intended to aid the New York grape industry and constituted unconstitutional economic protectionism. *Loretto Winery* underscores that the Commerce Clause, in lieu of a retaliatory free-for-all among the states, provides the constitutional means for challenging protectionist state legislation.

Further, despite appellants' comments about the Florida Take Back Provisions' equalizing competition, the Take Back Provisions do not even attempt to achieve proportionality. Under the Florida provisions, the state agency makes no attempt to calibrate any manufacturer's perceived advantage before denying the substantial commercial advantage conferred by the Florida law. The most trivial "economic incentive" provided by an out-of-state firm's home state might preclude the firm's receipt of the Florida tax break, whether the particular firm ever benefited from the incentive or not.

The Revised Florida Products Exemption discriminates against interstate commerce. Florida has sought a shortsighted parochial advantage at the expense of the national common market. The law's protectionist purpose coincides with its practical effect. Both the purpose and the effect make the statutes unconstitutional.

B. The Revised Florida Products Exemption Imposes an Unconstitutional Burden on Interstate Commerce.

If the Revised Florida Products Exemption did not have a protectionist purpose and effect and, thus, were not *per se* unconstitutional, Florida's alcoholic beverage tax scheme still would violate the Commerce Clause because it places an excessive burden on interstate commerce. The Commerce Clause requires this Court not only to determine whether the law is protectionist in purpose or effect, but also to inquire:

(1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). See also *Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The Revised Florida Products Exemption fails to satisfy even one of these requirements for constitutionality.

1. The Florida Tax Neither Regulates Even-Handedly nor Creates only Incidental Effects on Interstate Commerce.

As discussed above, Florida's taxing scheme is not evenhanded. Florida grants a tax exemption or preference to certain agricultural products and selects the products for no reason other than the fact of their cultivation in Florida. In this way, the burden of the Florida tax -- far from being evenhanded -- falls on those distributors who, lacking tax advantages, must sell higher-priced, non-Florida goods and suffer a corresponding loss of sales. (A. 374-80.)

The Florida tax's effects on interstate commerce are not "incidental." Florida's tax law does not directly affect only local

goods and, thus, only incidentally affect interstate commerce when those goods are sold. Rather, Florida's purposefully limited tax scheme seeks to favor Florida products and to disfavor foreign products in interstate commerce. (A. 378-80.) The direct result of Florida's alcoholic beverage tax scheme is the prohibited effect on interstate commerce. (A. 378-80.)

Appellants' citing to *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), does not support their claim of "incidental" effects. In *Exxon*, the Supreme Court upheld a Maryland statute concerning gasoline dealer against a Commerce Clause challenge. The Court expressly distinguished the Maryland statute, which did not impose any additional costs upon the out-of-state dealers, from the discriminatory state statutes that impose additional costs. *Id.* at 126. The Revised Florida Products Exemption, of course, erects a competitive barrier against out-of-state producers by imposing additional taxes upon every producer who does not produce Florida's products.

Moreover, the Court in *Exxon* distinguished the Maryland statute, which did not discriminate against interstate commerce, from state statutes that effectively "cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market. . . ." *Id.* at 126 n.16. In this case, the State admits that the Revised Florida Products Exemption effectively causes Florida products to gain market share by displacing out-of-state-products. (State's Brief at 27-28.)

2. The Florida Tax Does Not Serve a Legitimate Local Purpose.

As discussed above, Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. This purpose is illegitimate, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. See *Dean Milk Co., v. Madison*, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive

burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

Florida's desire to nurture local industry represents an attempt to further a purely economic purpose that -- whether the implementation is non-discriminatory or not -- is constitutionally suspect under the Commerce Clause. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 530-39 (1949). Accord L. Tribe, *American Constitutional Law* § 6-12, at 340-42 (1978) (contrasting health and safety laws with local economy laws). As the Supreme Court noted in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980):

In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

Appellants' citing *Archer Daniels Midland Co. v. State of Colorado*, 690 P.2d 177 (Colo. 1984), does not support their claim that the Florida statutes have a legitimate purpose. In *Archer Daniels Midland*, in upholding a Colorado statute against a Commerce Clause challenge, the Colorado Supreme Court found that the Colorado legislature "intended to provide an incentive to entrepreneurs to enter the fuel-grade alcohol market without subsidizing larger, more established producers," rather than intending to protect Colorado industry. *Id.* at 184. The Court emphasized that the challenged statute's effect did not depend on where a producer was located but rather on the size of the producer's operation. *Id.* at 185-86.

In contrast, the Florida legislature intended the Revised Florida Products Exemption to "enhanc[e] the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing," thereby protecting Florida industry. (State's Brief at 27.) The Florida statutes' effect depends on the producer's geography. Agricultural producers cannot change the climatic conditions of their respective states and countries in order to

qualify for Florida's favoritism for its local products. The Commerce Clause will not allow any state to hinder competition "with the products of another state or the labor of its residents." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

Moreover, the Florida tax cannot survive Commerce Clause scrutiny by attempting to compensate Florida products for any disadvantages other states may inflict. Even if Florida's compensating disadvantaged products were a legitimate state goal, the Florida tax irrationally relates its advantages for specific products under specific circumstances to the disadvantages the specific products suffer under other states' statutes. Florida's identification of any home state advantage (no matter how small) results in the loss of all Florida benefits (no matter how large). For example, if a New York manufacturer received a New York state subsidy of ten cents a gallon on wine exports to Florida, the manufacturer would lose his entire Florida exemption of as much as \$3.50 per gallon. The tax scheme's failure to calibrate its impact is a fatal constitutional defect. See *Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982) (State must narrowly tailor any reciprocity requirement to the state's legitimate purposes).

3. The Florida Tax Imposes Excessive Burdens on Interstate Commerce.

Florida's tax scheme necessarily achieves its purposes by placing a disproportionate burden on interstate commerce. Therefore, Florida has the burden of demonstrating that the local benefits from its tax outweigh the burden on interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977). Florida must justify its discriminating tax "both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. at 336. See also *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982). Florida cannot possibly carry this burden of proof.

Florida could have nurtured its local industry using means less discriminatory than a disproportionate tax on non-Florida alcohol. Indeed, several such alternatives have received express judicial approval under the Commerce Clause.

Among the many less discriminatory alternatives, Florida could have provided property tax relief to Florida's manufacturers or growers. The courts have approved this method of encouraging local industry. *See, e.g., Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 864 (S.D.N.Y. 1985). This type of non-discriminatory tax reform, which relieves local competitors of a tax, does not isolate non-Florida competitors for unique tax burdens and thus does not violate the "cardinal rule of Commerce Clause jurisprudence" that a state may not "impose a tax which discriminates against interstate commerce... by providing a direct commercial advantage to local business." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977)).

As another less discriminatory alternative, Florida could have stimulated its agricultural industry with direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for Florida products. *See generally Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. at 864 (discussing several alternatives).

In other words, Florida can effectively promote its industry without violating the Commerce Clause precept that it not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 337.

III. THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

The Revised Florida Products Exemption is unconstitutional under the federal Constitution for another, independent reason⁸. The Florida statutes violate a fundamental premise of federal-state relations. By authorizing its courts to inquire into foreign governments' policies and by attempting to change those policies that Florida finds distasteful, Florida has intruded impermissibly into the exclusively federal area of foreign affairs. Accordingly, Florida's statutes are unconstitutional. *See Zschernig v. Miller*, 389 U.S. 429, 430-41, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1376-80 (D.N.M. 1980); *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal Rptr. 800 (Ct. App. 1969); L. Tribe, *American Constitutional Law* § 4-5, at 172 (1978); 2 C. Antieau, *Modern Constitutional Law* § 10:19, at 37-38 (1969). *Cf. Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941).

The framers of the federal Constitution feared that individual states might impair foreign relations by unilateral action in the international sphere. "The peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." *The Federalist* No. 80, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original). In accordance with the clear intentions of the framers, the Supreme Court has declared without ambiguity that the individual state "does not exist" in the realm of foreign affairs. *United States v. Belmont*, 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed.1134 (1937).

⁸ Although the Circuit Court in its Order did not have to reach McKesson's arguments concerning the constitutionality of the Revised Florida Products Exemption in light of the federal government's power over foreign affairs, this Court may base its finding of unconstitutionality upon any reasonable basis for the finding in the record. *In Re Estate of Yohn*, 238 So. 2d 290, 295 (Fla. 1970); *State Plant Board v. Smith*, 110 So. 2d 401, 405 (Fla. 1959).

The Supreme Court applied these principles in *Zschernig v. Miller*, 389 U.S. 429 (1968), to invalidate an Oregon statute that conditioned the right of aliens to inherit Oregon property on the existence of reciprocal rights for United States citizens in foreign countries. The Oregon statute required state courts to inquire into the laws and policies of foreign governments and induced foreign nations to frame their inheritance laws so that Oregonians would have reciprocal inheritance rights. *Id.* at 433-41. The Supreme Court found that the Oregon statute "ha[d] a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. Accordingly, the statute was unconstitutional as a form of "state involvement in foreign affairs and international relations -- matters which the Constitution entrusts solely to the Federal Government." *Id.* at 436.

Florida's intrusion into foreign affairs is even deeper than Oregon's. Unlike the reciprocal inheritance statute in *Zschernig*, Florida's statutes directly conflict with specific, definitive articulations of United States policy in the sensitive areas of international trade. Congress, to whom the Constitution exclusively entrusts the regulation of "Commerce with foreign Nations," has enacted laws that pervasively regulate the imposition of customs duties on foreign imports. Federal law preempts state tax laws that intrude into this exclusively federal field. U.S. Const., art. I, § 8, cl. 3 (Commerce Clause). See *Xerox Corp. v. County of Harris*, 459 U.S. 145, 159, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982); *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1941).

Florida's Take Back Provisions deny tax preferences and exemptions to the products of countries that provide certain economic advantages to their own producers. §§ 564.09 and 565.12, Fla. Stat. (1985). The State has candidly described the Take Back Provisions as an effort to "foster a 'level playing field'" in the alcoholic beverages trade. (A. 566.) Florida's statutes are designed to level the playing field in two ways: (1) by attacking "the granting of a compounded benefit to producers in jurisdictions which already allow an exclusive, parochial incentive for such products"; and (2) by "discourag[ing] the implementation or continuance of purely local favoritism in other

jurisdictions." (A. 565.) Thus, Florida's retaliation against countries that favor their own products attempts to change the trade policies of the countries.

With these goals, Florida's statutes cannot pass muster under the Supremacy Clause. Federal legislation preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1940). Florida's Take Back Provisions are an obstacle to the Congressional purposes expressed in specific laws that direct the United States' commerce with foreign nations. These laws include the Trade Act of 1974, as amended (19 U.S.C.A. §§ 2411 through 2415 (West Supp. 1986)); The Tariff Act of 1930, as amended (19 U.S.C.A. §§ 1301 through 1677h (West Supp. 1986)); The Caribbean Basin Economic Recovery Act (19 U.S.C. §§ 2701 through 2706 (West Supp. 1986)); and the Wine Equity and Export Expansion Act of 1984 (19 U.S.C.A. §§ 2801 through 2806 (West Supp. 1986)). Florida's statutes also violate the United States' international obligations under the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6) (1947). Each of these federal laws preempts Florida's.

A. The Trade Act of 1974.

Congress, in the Trade Act of 1974, gave the President broad authority to negotiate trade agreements and to respond to actions by foreign countries that disadvantage United States commerce. Congress saw the need "to prevent a serious deterioration in the spirit of economic cooperation that is essential for the preservation of economic and political stability in a rapidly changing world." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7188). Florida, by taking unilateral action to level the international playing field, has unconstitutionally intruded into this exclusive federal area.

Section 301(a) of the Trade Act, as amended, authorizes the President to take "all appropriate and feasible action within his power" to "respond to any act, policy, or practice of a foreign country" that is

"unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce." 19 U.S.C.A. § 2411(a)(1)(B)(ii) (West Supp. 1986). Congress considered the President's retaliatory authority "a vital aspect of the trade negotiations" that the Trade Act authorized. S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7208-09). In the exercise of his broad statutory power, the President may selectively impose discriminatory tariffs and other restrictions against particular products and particular foreign countries. 19 U.S.C.A. § 2411(a)(2)(A) & (B) (West Supp. 1986). For example, the President recently authorized quantitative restrictions on certain European wine imports in response to European Economic Community restrictions on various United States products. 51 Federal Register 18,296 (May 16, 1986).

Congress purposefully has given the President central authority to direct the United States' response to burdens on its foreign commerce. The President must select the United States' retaliatory actions in light of international economics and politics. As Congress noted, "[t]rade policies cannot be divorced from other important contributions to, or influences on, the U.S. and world economies." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7189). Florida's unsanctioned interference in this process can only hinder the federal government's efforts to achieve beneficial trade relations for the whole United States.

B. The Tariff Act of 1930.

Section 303 of the Tariff Act of 1930, as amended, protects United States commerce from foreign subsidization of exports. Under the Tariff Act, whenever the Secretary of the Treasury determines that a foreign export has received a subsidy, the Secretary must levy a countervailing duty in the amount of the subsidy. 19 U.S.C.A. § 1303(a)(1) (West 1980).

Similarly, Florida's Take Back Provisions impose discriminatory taxes on alcoholic beverages from countries "which provide export subsidies for agricultural products used in making said alcoholic

beverages" or "other economic incentives or advantages." §§ 564.06(9)(b) & (c), 565.12(1)(c)(2) & (3), and 565.12(2)(c)(2) & (3), Fla. Stat. (1985). By thus intruding into the area of foreign export subsidies, Florida's statutes frustrate the goals of the federal countervailing duty statute.

The federal Act was carefully drafted to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies." *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 456, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978). The Secretary of the Treasury is empowered to establish regulations to "accurately carry out this purpose." *Id.* *See also* 19 U.S.C.A. §§ 1303(b) and 1677 (West 1980). In light of the federal policy of measured response, Florida cannot impose its own additional tax. Florida's discriminatory tax frustrates Congress' intention to offset accurately foreign trade advantages.

C. The Caribbean Basin Economic Recovery Act (CBERA).

Congress enacted the Caribbean Basin Economic Recovery Act (CBERA) in 1983. The purpose of CBERA is to address "deep-rooted structural problems" in the Caribbean Basin which have "caused serious inflation, high unemployment, declining gross domestic product growth, enormous balance-of-payments deficits, and a pressing liquidity crisis." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 644). The legislative history demonstrates Congress' concern that "this economic crisis threatens political and social stability throughout the region and creates conditions which Cuba and others seek to exploit through terrorism and subversion." *Id.*

Through CBERA, Congress has addressed Caribbean Basin problems by authorizing the President to offer trade benefits to Caribbean nations that satisfy certain political, economic, and social criteria. 19 U.S.C.A. § 2702 (West Supp 1986). "The centerpiece of the U.S. program is the offer of *one-way* free trade." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (reprinted in 1983 U.S. Code Cong. & Admin. News at 643, 644) (emphasis added). *See also*

the Congress Transmitting the Proposed Caribbean Basin Economic Recovery Act, 18 Weekly Comp. Pres. Doc. 323 (Mar. 17, 1982). CBERA authorizes a *complete* exemption from United States customs duties for most products, including sugarcane rum, from qualified Caribbean nations. Congress intended to increase sales of Caribbean rum by reducing the price to U.S. consumers. CBERA eliminates the usual \$10.50 per proof gallon excise tax on imported distilled spirits. H. Rep. No. 98-26, 98th Cong., 1st sess., at 26 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 667).

Florida, a major producer of sugarcane, competes in the market for alcoholic beverages with several Caribbean nations. (A. 367-68.) The Revised Florida Products Exemption affects, for example, the rum market by granting preferential tax rates to alcoholic beverages made from Florida sugarcane. Florida's potential denial of these preferences to Caribbean rum would frustrate the federal policies expressed in CBERA. At the same time the United States seeks to *decrease* the price of Caribbean rum through an exemption from customs duties, Florida threatens to *increase* the price through its Take Back Provisions. The federal purposes expressed in CBERA will fail if Florida is free to impose a tax that offsets the competitive advantages that Congress has conferred. Cf. *Xerox Corp. v. County of Harris*, 459 U.S. 145, 152 (1982).

Further, Florida's administration of the Take Back Provisions directly involves Florida courts in impermissible foreign policy judgments. The factors that the Florida legislature has directed its courts to consider in applying the Take Back Provisions overlap with the factors that the President considers in determining whether to grant a particular Caribbean nation beneficiary status under CBERA. For example, a Florida court applying the Take Back Provisions considers whether a foreign country "impose[s] discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries," "provide[s] agricultural price supports or other economic incentives or advantages," or "provide[s] export subsidies." §§ 564.06 and 565.12, Fla. Stat. (1985). Under CBERA, the President considers:

(3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country; [and]

...

(5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade

19 U.S.C.A. §§ 2702(c)(3), 2702(c)(5) (West Supp. 1986). In essence, Florida law directs Florida courts to make unauthorized foreign policy judgments that may subvert the President's and Congress' legitimate foreign policy judgments.

D. The Wine Equity and Export Expansion Act of 1984.

The Wine Equity and Export Expansion Act of 1984 is Congress' effort to remedy "a substantial imbalance in international wine trade." 19 U.S.C.A. § 2801(a)(1) (West Supp. 1986). Like Florida, Congress was concerned that "the United States wine industry faces restrictive tariff and nontariff barriers in virtually every existing or potential foreign market." *Id.* The Act requires the President to "direct the [United States] Trade Representative to enter into consultations with each major wine trading country to seek a reduction or elimination of that country's tariff barriers and nontariff barriers to (or other distortions of) trade in United States wine." 19 U.S.C.A. § 2804(a) (West Supp. 1986). The Act also authorizes the President to take action under the Trade Act of 1974 to respond to foreign trade barriers. 19 U.S.C.A. § 2804(c) (West Supp. 1986).

Florida's Take Back Provisions directly intrude into the federal government's diplomatic and regulatory activities in this area. Florida imposes its own discriminatory tax on "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries." §§ 564.06(9)(a), 565.12(1)(c)(1), and 565.12(2)(c)(1), Fla. Stat.

(1985). Florida's sharing some of the federal government's goals in this area does not provide a legitimate occasion for Florida to make foreign policy. "Only the federal government can fix the rules of fair competition when such competition is on an international basis." *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. 800, 803 (Ct. App. 1969). "[T]he existence of [a] federal Act cannot serve as a justification for state legislation since . . . it is the sole province of the federal government to act in this sphere." *Id.* at 804 n.8.

E. The General Agreement on Tariffs and Trade (GATT).

In the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6), the United States and its major trading partners have pledged to refrain from specific discriminatory trade practices. The Take Back Provisions of the Revised Florida Products Exemption directly conflict with the United States' obligations under GATT.

GATT prohibits discriminatory taxes such as Florida's with the following provision:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin.

GATT, pt. II, art. III, § 1, 61 Stat. (part 5) A18 (1947) (first sentence). By definition, any application of Florida's Take Back Provisions to the products of a foreign country would violate GATT. Whenever a Florida court applies a Take Back to a foreign product -- thus withholding the tax exemption or preference afforded to Florida products -- that product is burdened with "internal taxes . . . in excess of those applied directly or indirectly to like products of national origin."

GATT, as an international agreement, supersedes Florida law by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2. *See*

generally *United States v. Belmont*, 301 U.S. 324, 331-32 (1937). Indeed, one court has held unconstitutional a state statute that contravened GATT by placing restrictions on the sale of foreign imports. *Territory v. Ho*, 41 Haw. 565, 567-71 (1957). However, regardless whether GATT directly preempts inconsistent state legislation, GATT is also an authoritative articulation of United States foreign policy with which Florida may not interfere. Thus, Florida's interference with foreign policy is invalid under *Zschernig v. Miller*, 389 U.S. 429 (1968).

Florida's attempt at the regulation of foreign trade is, in a word, unconstitutional.

IV. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE.

The Import-Export Clause's purpose is to insure that, in regulating commercial relations with foreign governments, the United States is able to "speak with one voice." *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276, 285, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976). Thus, the clause prohibits any discriminatory tax by a state on imported goods and not merely direct taxes on importation. *Id.* at 288 n.7. *See also Cook v. Pennsylvania* 97 U.S. 566, 24 L.Ed. 1015 (1878).

The Revised Florida Products Exemption, by authorizing the denial of tax exemptions to foreign alcohol, effectively imposes a duty upon imports. As a result, Florida's statutes violate the Import-Export Clause of the United States Constitution. U.S. Const., art. I, § 10, cl. 2; *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976); *Miller v. Publiker Industries, Inc.*, 457 So.2d 1374, 1376 (Fla. 1984).

As discussed above, Florida's Take Back provisions expressly authorize discrimination based on national origin. The Take Back Provisions empower Florida courts and officials to examine and judge the agricultural and trade policies of foreign governments. This

examination presupposes calculated discrimination. In effect, Florida's statutes require Florida to impose different taxes on the products of different countries solely on the basis of the place of origin.

The Import-Export Clause, as the Supreme Court interprets it, leaves no room for the Revised Florida Products Exemption. In *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976), the Court made clear that a state tax may not constitutionally "fall on imports as such because of their place of origin." *Id.* at 286. Although the Import-Export Clause does not accord imported goods preferential treatment, it "clearly prohibits state taxation based on the foreign origin of the imported goods." *Id.* at 287. The Court in *Michelin Tire Corp.* approved a nondiscriminatory state property tax because, unlike Florida's statutes, "it [could not] be used to create special protective tariffs or particular preferences for certain domestic goods, and it [could not] be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." *Id.* at 286.

For over a century, the Supreme Court has not hesitated to invalidate discriminatory state taxes on imports. In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964), for example, the Court held unconstitutional a ten-cent-a-gallon tax imposed by Kentucky on all persons bringing distilled spirits into the state. Kentucky's law, like Florida's, discriminatorily taxed liquor from other states and countries. When challenged under the Import-Export Clause by an importer of Scottish whiskey, the Kentucky law succumbed. See also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448, 6 L.Ed. 678 (1827) (invalidating discriminatory tax on imports); *Cook v. Pennsylvania*, 97 U.S. 566, 569 (1878) (invalidating taxes at retail level that favored certain specified domestic goods).

In addition, this Court's own analysis of the Import-Export Clause agrees with the United States Supreme Court's. In the recent case of *Miller v. Publiker Industries, Inc.*, 457 So. 2d 1374 (Fla. 1984), this Court held unconstitutional a Florida tax that exempted motor fuels

containing a stated percentage of alcohol. The exemption applied, however, only to alcohol distilled from United States agricultural products. This Court held the tax exemption unconstitutional because it "constitute[d] discriminatory taxation based upon the foreign origin of a product in violation of the import-export clause." *Id.* at 1376.

This Court's analysis in *Publiker* applies here. The tax in *Publiker* expressly favored goods of "U.S. origin." The Revised Florida Products Exemption's discrimination is less obvious in its effect on foreign goods because the legislature drafted the statute using generic descriptions of Florida products. Nevertheless, in this case, as in *Publiker*, the Florida legislature has authorized discrimination based on national origin. As in *Publiker*, Florida can discourage the consumption of foreign products by applying the Revised Florida Products Exemption's Take Back Provisions.

Florida's tax scheme is unconstitutional under the Import-Export Clause.

V. THE CIRCUIT COURT PROPERLY ENTERTAINED McKESSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

The Circuit Court recognized that McKesson's motion for partial summary judgment and the State's opposition to the motion did not raise a controversy concerning any genuine issue of material fact. McKesson and the State did not disagree on the authenticity of McKesson's submission of the legislative history. (The parties only disagreed on the legal significance of the Florida legislators' statements.) McKesson and the State did not disagree that the Florida statutes effect what appellants describe in their briefs as a "restructuring" of the Florida alcoholic beverage market by "encouraging" the sales of local products. (The parties only disagreed on the legal significance of indisputable agricultural economics.)

Accordingly, the Circuit Court determined that summary judgment was appropriate. No controversy concerning a genuine issue of material fact existed, Fla. R. Civ. P. 1.510(c), and any disputes as to

matters of law did not prevent entry of summary judgment. *Armstrong v. Southern Bell Telephone & Telegraph Co.*, 366 So. 2d 88, 90 (Fla. 1st DCA 1979). As the United States Supreme Court recently decided in *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986), under an identical standard --

[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

After McKesson filed its motion, the State did not suggest to the Circuit Court, through the filing of an affidavit or otherwise, that the Court should delay its consideration of the constitutionality of the Florida statutes. Florida law, of course, provides that a party may request a continuance of a hearing on a motion for summary judgment only by the filing of an affidavit, showing that the party cannot present facts essential to justify his opposition. Fla. R. Civ., P. 1.510(f). Continuance of a summary judgment hearing to permit additional discovery to prepare an opposition is at the discretion of the trial court. *Rosen v. Parkway General Hospital, Inc.*, 265 So. 2d 93, 95 (Fla. 3d DCA 1972).

On appeal, the State now suggests that the Circuit Court did not allow the State to complete its discovery concerning McKesson's standing. The State apparently wanted to discover facts that would establish that McKesson is not a producer of agricultural products or manufacturer of alcoholic beverages. Any discovery, however, about McKesson's production of the favored agricultural products or qualification of alcoholic beverages for preferential treatment was irrelevant to McKesson's challenge to the Florida statutes. McKesson indisputably established the factual basis for standing by demonstrating that it has been a distributor of alcoholic beverages and has paid the challenged taxes.

The Circuit Court did not abuse its discretion in entertaining McKesson's motion for partial summary judgment.

VI. McKESSON IS ENTITLED TO A REFUND OF THE TAXES IT HAS PAID WHICH FLORIDA HAS COLLECTED UNDER THE UNCONSTITUTIONAL STATUTES.

As a matter of federal Constitutional law, as well as Florida law, McKesson is entitled not only to a declaration that the Revised Florida Products Exemption is unconstitutional but also to the constitutional remedy for Florida's discrimination. In its prayer for relief in this action, McKesson has asked for an order directing the Florida Comptroller to grant a refund to McKesson of taxes Florida has collected from McKesson under the unconstitutional statutes. Pursuant to section 215.26, Florida Statutes (1985), McKesson, which has paid these taxes under protest, is entitled to an appropriate refund of discriminatory taxes. For each of the Florida statutes' classifications for wine and liquor, McKesson must receive the difference between what it has paid and what a distributor who sold favored products paid.

A. Under Both Federal Constitutional Law and State Law, McKesson Is Entitled to a Tax Refund.

Under federal constitutional law, the taxpayer's remedy for an unconstitutional state tax statute is an action to recover the taxes. In *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280, 285, 32 S.Ct. 216, 56 L.Ed. 436 (1912) (finding a tax an unconstitutional burden upon interstate commerce), Justice Holmes stated:

It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

The United States Supreme Court has not permitted a state to collect or retain taxes assessed under an unconstitutional statute. *See, e.g.*,

Dept. of Revenue v. James Beam Co., 377 U.S. 341 (1964) (affirming Kentucky Court of Appeals judgment granting refund of alcoholic beverage taxes collected under a state statute that violated the Import-Export Clause); *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436 (1952) (reversing, without remand, state court's reversal of trial court's granting a refund of tax violating Commerce Clause); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931) (holding that a taxpayer may recover the excess taxes paid); *I. M. Darnell & Sons Co. v. City of Memphis*, 208 U.S. 113, 120, 28 S.Ct. 247, 542 L.Ed. 413 (1908) (finding tax that violated Commerce Clause a "nullity"); *Tierman v. Rinker*, 102 U.S. 123, 127, 26 L.Ed. 103 (1880) (ruling statute "inoperative" so far as it discriminates).

Thus, federal courts in this century have required states to refund unconstitutional taxes to taxpayers. In *Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S.Ct. 121, 74 L.Ed. 478 (1930), the Court determined that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Accord Gallagher v. Evans*, 536 F.2d 899, 900-01 (10th Cir. 1976). In *United States v. State Tax Commission*, 645 F.2d 4 (5th Cir. 1981), *cert. denied*, 454 U.S. 896, 102 S.Ct. 394 (1981), a state refused to refund an unconstitutional tax imposed on instrumentalities of the federal government on the ground that the federal government had failed to comply with a state statute. The Court rejected the state's argument:

The retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of the tax in the first instance.

645 F.2d at 5.

The Supreme Court and other federal courts appreciate that when a tax is unconstitutional, only the remedy of a refund will cure the constitutional injury. A taxpayer suffers the constitutional injury when it pays a discriminatory tax that provides "a direct commercial

advantage to local business." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984). The taxpayer, therefore, has a federal right to a remedy -- a right to a refund of the difference between the disfavored products' rate and the favored products' rate. Permitting the State to avoid that remedy through a declaration of prospective relief would provide an incentive to continue to enact and collect illegal taxes. The State would enjoy the benefit of its unconstitutional acts without remedying its violation of the federal Constitution. Indeed, by rearranging the language of its statutes, the State could repeatedly attempt to continue to collect unconstitutional taxes. The federal constitutional system could not tolerate this situation.

Of course, under Florida law, as under federal constitutional law, the taxpayer's remedy for an unconstitutional tax scheme is an action to recover the taxes paid. See, e.g., *Osterndorf v. Turner*, 426 So. 2d 539, 545 (Fla. 1982); *City of Miami v. Florida Retail Federation, Inc.*, 423 So. 2d 991, 993 (Fla. 3d DCA 1982); *Coe v. Broward County*, 358 So. 2d 214, 216 (Fla. 4th DCA 1978). This Court, echoing Justice Holmes' statement in *Atchison*, has stated: "In this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover. . . ." *State of Florida ex rel. Palmer-Florida Corp. v. Green*, 88 So. 2d 493, 495 (Fla. 1956) (ordering recovery of documentary tax).

The Supreme Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), after holding that the Hawaii statute unconstitutionally discriminated against interstate commerce, did not resolve the question of a refund. The alcoholic beverage distributors challenging the statute had sought a total refund of approximately \$45 million. *Id.* at 266. The Court directed the Hawaii court to address the refund issues, reasoning that application of state law might obviate consideration of federal constitutional law. "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." *Id.* at 277 n.14.

In this case, since Florida law does mandate a full refund of taxes under a discriminatory tax scheme, this Court does not need to look

any further than Florida law to provide a remedy for McKesson's constitutional injury.

B. The Circuit Court's Declaration of Unconstitutionality Warrants the Remedy of a Refund.

The Circuit Court erred in declaring that its holding, striking the unconstitutional portion of the statutes, would operate only prospectively in this case. The Circuit Court may not deny relief to McKesson, which has timely pursued its challenge to the statutes. Florida may not, consistent with state law, retain the benefits of its unconstitutional tax scheme.

In *State ex rel. Nuveen v. Greer*, 88 Fla. 249, 102 So. 739 (1924), this Court articulated the traditional rule regarding the effect of a court's holding a statute unconstitutional:

[W]hen an act of the Legislature is duly held to be invalid because in conflict with express or implied provisions of the Constitution, it is invalid from its enactment, and not from the date of the decision adjudging its invalidity. . . .

Id. at 744. The Court noted that once a court determines that a statute is invalid, "the Constitution then operates to make the statute void from its enactment," and the court cannot restrain the Constitution's operation. *Id.* at 745.

The *Nuveen* Court, however, recognized that there may be an exception to the traditional rule where an appellate court had, at one point, declared a statute valid under the Constitution and, after persons had acquired rights in reliance on the court's opinion, a later court overruled the former opinion and declared the statute unconstitutional. The Court noted that the law may protect rights acquired under such circumstances. *Id.* See also *Florida Forest and Park Service v. Strickland*, 154 Fla. 472, 18 So.2d 251, 253 (1944).

This Court later recognized a further exception to the traditional rule in *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla.

1973). In *Gulesian*, the Circuit court had declared invalid under the Florida Constitution a particular tax collection levied for Dade County schools. However, the Court denied a tax refund to the plaintiff class, which included more than 350,000 persons. The Court noted that the school board had adopted the particular tax levy in good faith reliance on a presumptively valid state statute and that requiring a refund in small amounts to over 350,000 Dade County taxpayers, who had paid the tax without protest, would impose an intolerable burden on the school board. The Supreme Court, agreeing with the trial court's reasoning, affirmed.

Appellants, cannot benefit from the two exceptions.

First, in contrast to *Nuveen*, the State cannot assert that, at an earlier date, a court had declared the Revised Florida Products Exemption valid under either the United States Constitution or the Florida Constitution. Therefore, the State cannot argue that any person has acquired property or contract rights by relying on a prior authoritative judicial declaration of constitutionality, before a later finding of unconstitutionality.

Second, in contrast to *Gulesian*,⁹ McKesson's constitutional injury warrants a monetary remedy. Unlike the Dade County School Board, which relied, as it must, on legislative authorization, the State in this case did not *rely* on invalid statutes but rather *enacted* the unconstitutional statutes. Further, the State acted after the United States Supreme Court's holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), as well as this Court's holding in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984), plainly circumscribed the State's ability constitutionally to promote local industry. Indeed, the Florida Department of Business Regulation warned in a memorandum that the Revised Florida Products Exemption continued the unconstitutional discriminatory effect of the Florida Products Exemption, which the revised scheme replaced.

⁹ In *Coe v. Broward County*, 358 So. 2d 214, 216 (Fla. 4th DCA 1978), the Court of Appeal, stating that a taxpayer normally is entitled to a refund of taxes paid pursuant to an unlawful assessment, suggested that the holding in *Gulesian* represents a narrow exception.

(A. 479-85.) Unlike the 350,000 taxpayers in *Gulesian* whose school taxes were only slightly higher than they should have been, McKesson, which paid the taxes under protest, has incurred a substantial constitutional injury under the discriminatory tax scheme.

Thus, this Court should apply the retroactive-prospective doctrine that this Court has structured in a series of cases and provide a refund remedy for the constitutional injury to those taxpayers who actually filed the suit challenging the validity of the tax scheme. See *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972), *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993, 995 (Fla. 1976), *Osterndorf v. Turner*, 426 So.2d 539, 541, 545 (Fla. 1982), *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984), and *Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985). In *Osterndorf v. Turner*, 426 So.2d 539, 545 (Fla. 1982), this Court held unconstitutional a statute granting an enhanced homestead exemption to long-term Florida residents but not to others. This Court made its ruling prospective, but added --

The petitioners in this case, however, are entitled to a refund of the amount of additional taxes they paid by reason of the denial of the enhanced exemption, as are any other litigants who have timely judicially challenged the statute.

McKesson, which has timely judicially challenged the Revised Florida Products Exemption, is entitled under Florida law to receive an appropriate refund.

CONCLUSION

McKesson respectfully [sic] asks this Court to end Florida's violation of the federal Constitution's proscriptions by, first, affirming the Circuit Court's declaration of unconstitutionality and, second, directing the Circuit Court to award McKesson a tax refund of the difference between what McKesson paid in taxes and what McKesson

would have paid if its products had received the same treatment as the favored products.

Dated: May 14, 1987

Respectfully submitted,

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(Certificate of Service omitted in printing)

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 70,368

(Caption omitted in printing)

REPLY BRIEF OF THE DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION

(Table of contents and table of authorities omitted in printing)

ARGUMENT

I

THE PRODUCT CLASSIFICATIONS OF THE STATUTES
UNDER SCRUTINY DO NOT VIOLATIVE THE COMMERCE
CLAUSE

In analyzing the statutes for consistency with the Commerce Clause, it is abundantly clear that the decision by the Florida Legislature to classify alcoholic beverages manufactured from sugarcane, citrus and selected grape species does not violate the Commerce Clause.

Appellees' laborious arguments to the contrary, the United States Supreme Court has been careful to point out that holdings finding discrimination with regard to taxation do not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry". *Boston Stock Exchange v. State Tax Commission*, 97 S.Ct. 599, 610, (1977); *See also, Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200 (1984). The central thesis of Appellees' argument that the product classifications - as distinguished from the disqualification provisions of the statutes - discriminate against interstate commerce is stated in page 37 of McKesson's Answer Brief:

Florida's desire to nurture local industry represents an attempt to further a purely economic purpose that - whether the implementation is non-discriminatory or not - is constitutionally suspect under the Commerce Clause.

That premise is the direct antithesis of the Supreme Court's caveat quoted above. It is clear, upon a moment's reflection, that the product classifications themselves do not in any way discriminate, within the meaning of Commerce Clause cases. The classification of those products for favorable tax treatment are thus clearly valid under cases such as *Exxon Corp. v. Governor of Maryland*, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978). That the operation of the classifications may "cause business to shift from one interstate supplier [for example grain based alcoholic beverages] to another interstate supplier [sugarcane based or citrus based alcoholic beverages] does not violate the Commerce Clause". That clause "protects the interstate market, not particular interstate firms..." *Exxon Corp. v. Governor of Maryland, supra*, 98 S.Ct. 2214-2215. Indeed, if the Appellees' were correct that the State of Florida may not classify alcoholic beverages according to product base for different tax treatment, then the entire tax structure of Chapter 565 and Chapter 564, Florida Statutes - and that of virtually every other state in the Union - is invalid. If the mere classification of beverages for different tax treatment according to the type of beverages is unlawful because it somehow disadvantages agricultural producers of various base materials, then the State may not tax beer at a rate different from the rate at which it taxes distilled liquors. To do so would, according to Appellees' analysis, discriminate against the producers of raw agricultural crops in those states and nations which, because of climatic conditions, are not suited to the commercial growth of hops and malt, the preferred ingredients for the making of beer. Likewise, if Appellees' analysis is correct, neither the State of Florida nor any other state of the Union could impose a different tax rate on wines than on beer and distilled liquors, for the same reasons. Appellees' argument that the product classifications themselves result in prohibited discrimination under the Commerce Clause is clearly erroneous, constitutes a perversion of Commerce Clause precedents, and ought not be adopted by this Court.

II

THE APPELLEES DID NOT DEMONSTRATE BELOW THAT THE
DISQUALIFICATION PROVISIONS OF THE STATUTES
RESULT IN A COMMERCE CLAUSE VIOLATION

The Appellees argue that the disqualification provisions contained in §564.06(9) and 565.12(1)(c), (2)(c), Florida Statutes (1985) are discriminatory in purpose and, on that ground alone, are in violation of the Commerce Clause. In essence Appellees argue for a pure motive analysis, the contention that the motives of the Legislature alone, if discriminatory, are sufficient to invalidate the statutes.

However, although pure motive analysis has been argued by some scholars, the United States Supreme Court has not adopted a pure motive standard for the invalidation of a statute under the Commerce Clause. Indeed in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 528(1937) the Court held that: "motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful". In the years ensuing the Supreme Court has not retreated from that position. There is dictum in the *Bacchus* case which indicates that motives could be a sufficient basis for invalidation of a statute. However, the holding in *Bacchus* is as follows:

We therefore conclude that the Hawaii liquor tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had *both the purpose and effect* of discriminating in favor of local products.

104 S.Ct. 3049, 3057 (emphasis supplied).

Whatever the United States Supreme Court has said in dicta, it has not stricken a statute purely on the basis of motivations of legislators in its enactment. In each case there was either facial discrimination *de jure* or discrimination in practical effect, demonstrated by evidence adduced in the record.

In this case there is simply no evidence in the record which demonstrates that the disqualification provisions of these statutes in practical effect discriminate against manufacturers of alcoholic beverages produced from sugarcane, citrus or the grape species in states and jurisdictions other than Florida. There is no allegation, nor any evidence, that any manufacturer would be denied an exemptive license based upon the disqualification provisions. Indeed, there is evidence in this record that the Division of Alcoholic (sic) Beverages and Tobacco would have granted such a license to an alcoholic beverage manufacturer outside the State of Florida had the application not been withdrawn by that manufacturer. Thus, upon the tests adopted in the holdings of Commerce Clause precedents, this record is wholly inadequate to determine that the disqualification provisions of these statutes render them discriminatory in practical effect.

Let us assume, however, for the purposes of argument that the Appellees (sic) "motivation only" analysis is appropriate. Even if that proposition were true, this record is insufficient to justify the trial court's granting of summary judgment based upon such an analysis. Appellees cite the comments of Senator McPherson and Representative Jones before legislative committees for the proposition that the motivation of the Legislature as a whole in enacting the disqualification provisions was discriminatory. What Appellees failed to bring to the Court's attention, however, is that even the most dedicated proponents of pure motivation analysis under the Commerce Clause concede that discriminatory motivation on the part of a few legislators is insufficient to establish discriminatory motivations on the part of the legislature as a body. *E.g.*, Regan, D. H. "The Supreme Court And State Protectionism: Making Sense Of the Dormant Commerce Clause", 87 Mich. L. Rev. 1091, 1149 (1986).

For every statement by Senator McPherson and Representative Jones which evinces discriminatory intent on their parts, this record contains statements by other members of the legislature evincing clearly non-discriminatory intent. For instance in the hearings on May 14, 1985 before the Senate Finance and Taxation Committee of the Florida Legislature the chairman of that committee indicated his desire to modify Florida's tax preference to meet the constitutional

requirements announced in *Bacchus*. He recognized, however that in doing so, a formula was needed to prevent an erosion of the beverages excise tax base which would follow on expansion of the tax preference to meet *Bacchus* concerns.¹

The discussion between the Chairman of the House Finance and Taxation Committee and Representative Jones at the May 8, 1985 Committee hearing demonstrates the clear belief of the Chairman that the statute, as amended, would open the tax exemption to non-Florida manufacturers, thus triggering the Chairman's concern that a formula be adopted which would limit the erosion of the tax base by creating a sliding scale tax. R. Vol. 1, pp. 149-153.

Indeed, the clearest indication that the Florida Legislature, as a whole, believed that the new Acts would expand the availability of exemption to non-Florida manufacturers is found on the face of the statutes themselves. §§564.06(10) and §565.12(5),(6), Florida Statutes, (1985) contain lengthy and carefully drafted sliding scale tax rates designed to place a floor under the erosion of the tax base which would be occasioned by the unchecked growth of manufacturers selling exempt products in the state. Those provisions constitute, in fact, the bulk of the statutory language of §§564.06 and 565.12 as amended. A comparison of §§564.06 and 565.12, Florida Statutes, (1985) with the pre-existing statutes reveals that the earlier statutes contain no such formula capping the amount of taxes which would be lost as a result of the exemptions. The ineluctable reason for the existence (sic) of the sliding scale tax in the new statutes and its non-existence (sic) in the prior statutes is a legislative perception that the new statutes would, indeed, expand the availability of the exemption to manufacturers outside the State of Florida who theretofore had been

¹ THE CHAIRMAN: "What I'm trying to do is keep the exemption for distillers in effect. And what has happened in the Supreme Court in the *Bacchus* case is that has made the ruling that would tend to jeportize our existing language...What this attempts to do would be to redraw it, the same basic dollar amount, the same concept, but make it so that its constitutional". R. Vol. I, p. 179.

See also, the statement of the Chairman of the Senate Commerce Committee at R. Vol. I, p. 177-178.

denied that exemption. On the face of the statutes, then, the clear inference is that the motivation of the legislature in enacting these statutes was not discriminatory.

Thus, even if one fully accepts the "motivation" analysis put forward by Appellees, the inferences in this record are wholly in conflict. The cases are not capable of resolution by summary judgment. The proponents of motivation analysis concede that the courts must look to a statute's practical effect in many cases for evidence of discriminatory motivation on the part of the legislature as a whole. *E.g.*, Regan D. H. "The Supreme Court And State Protectionism: Making Sense Of The Dormant Commerce Clause", *supra* at 1137. On this record, conflicting inferences as to the motivation of the legislative body as a whole exist. To resolve that conflict, the trial court was required to look into the statutes' practical effect. This record is wholly lacking in evidence which would demonstrate that the practical effect of these laws is to operate in a discriminatory fashion against beverages manufactured in foreign jurisdiction. The trial court's final orders in these cases indicate a belief that the motivation of the legislature in enacting the 1985 amendments was not discriminatory. The following paragraph appears identically in each of the court's final orders:

These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverage laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

Final order on Summary Judgment R. Vol. 8, p. 1458. Reflection upon that passage demonstrated no hint that the trial court made a factual finding of discriminatory motivation on the part of the Florida Legislature in adopting the 1985 amendments to these statutes. Without such a finding of the trial court, with conflicting inferences in this record, and with the dearth of information about the statutes' practical effect, judgment for Appellees is wholly inappropriate.

SUMMARY JUDGMENT ON THIS RECORD IS
INAPPROPRIATE

Before addressing the remaining issues presented in Appellees answer briefs DABT believes it would be instructive to explain its general position that the trial court erred in granting summary judgment. The state of this record has implications not only for standing, with respect to challenge of the disqualification provisions by McKesson Corporation, Florida Beverage Corporation and Tampa Crown, but also with respect to discrimination analysis under the Commerce Clause. Further, the lack of proof and opportunity for inquiry as to the practical effect of these statutes in the record precludes the grant of summary judgment on any theory advanced by Appellees. At bottom, Appellees' theories, other than the facial challenges fall into two general categories: (1) that the disqualification provisions intrude into areas of foreign policy (2) that the disqualification provisions have been preempted by positive Federal enactments. Those challenges must proceed upon an as-applied analysis of the sphere of operation of the disqualification provisions, their true effects in practice, and the intent of Congress and the Federal Government. They depend upon the facts asserted to exist in Appellees briefs, but which find no support from admissible evidence in the record below, as does the standing of Appellees.

For instance at page 12 to 13 of McKesson's Answer Brief at footnote 1 there is a discussion by McKesson of factual grounds which McKesson asserts would operate to deny exemption to Mt. Gay Rum which McKesson imports from Barbados. In support of its position, McKesson asserts as follows:

Mt. Gay Rum, a sugarcane product, would qualify for the tax preference under section 565.12 (1)(b), Florida Statutes (1985), but for the Take Back Provisions...In addition, a Barbados government agency, the Barbados Export Promotion Corporation, provides economic advantages to Barbados rum manufacturers. Therefore, under the Take

Back Provisions, McKesson's [rum]... is ineligible to receive Florida's unconstitutional tax break.

There is no reference whatsoever in the record below to the existence of the Barbados Export Promotion Corporation or any description of the alleged economic advantages which it grants to Barbados rum manufacturers. There is no proof in the record below that Barbados offers to its manufacturers the sort of economic incentives or other direct or indirect subsidies which would disqualify that rum from receiving tax preferred treatment in the State of Florida. Florida Statutes §90.202 (3) and §90.204 establish the procedure whereby these Appellees might have established the existence of foreign law. There was no request for judicial notice as to the laws of Barbados put forward by Appellees pursuant to those provision of Florida's evidence code and the Court did not in its final order take judicial notice of the provisions of the laws of Barbados or any other foreign nation. The Peck affidavit, R. Vol. I, pp. 103 - 110, does not establish that affiant's expertise in and qualifications to render an opinion as to the provisions of Barbados law. Therefore, the factual assertion which underpins McKesson's assertion to this Court that it has standing to challenge disqualification provisions is wholly without support in the record below.

Appellees' assertion that the disqualification provisions of the statutes constitute discrimination under the Commerce Clause, under the Import/Export Clause, and result in impermissible intrusion into foreign affairs all depend in part upon a finding that the practical effect of the statutes is to discriminate against foreign commerce or to clearly create a foreign affairs problem. *E.g.*, *Department of Revenue v. Association of Washington Stevedoring Co's.*, 435 U.S. 734, 98 S.Ct. 1388 (1978); *Container Corp. of America v. Franchise Tax Bd.*, 103 S.Ct. 2933 (1983). Appellees repeatedly assert that, in fact the practical effect of these statutes is to create such discrimination. At page 22 of its brief McKesson asserts that the exemptions "favor Florida producers". Again at page 28 McKesson asserts as a factual matter:

Florida's overriding purpose for its alcoholic tax scheme is to encourage the sale of Florida products at the expense of non-Florida products.

Again, at page 36, McKesson asserts as a factual matter that the effect of the statutes is to impose a barrier against out-of-state producers by imposing additional taxes on *every producer* who does not produce Florida's products.

As demonstrated above, there is absolutely no proof that the practical effect of the statutes are as Appellees assert them to be. The central underpinning of Appellees' theories before this Court is thus without factual support in the record below and summary judgment based thereon is clearly inappropriate.

As pointed out in the initial brief filed by DABT, there is in this case a ripeness problem. It becomes evident when one examines the arguments of Appellees. At page 48 of McKesson's answer brief McKesson makes an interesting statement:

Florida's *potential* denial of these preferences to Caribbean rum would frustrate federal policies expressed in CBERA.

The use of the word "potential" was not mistaken; it was deliberate. McKesson uses that word in its brief because it must concede that there is no proof in this record that the Florida statutes would deny tax preferences to manufacturers in any Caribbean Basin nation. Nor is there any proof in this record that the disqualification provisions would operate to deny tax preference to a manufacturer in any foreign nation.

Therefore the record is insufficient to support that critical finding.

The prematurity of summary judgment based upon the inability of Defendants to complete discovery and the lack of a complete factual record is apparent. That error by the trial court infected the proceedings in their entirety.

Tampa Crown and Florida Beverage argue that, as to them, entertaining a motion for summary judgment was not premature. DABT would agree that if the Tampa Crown case had been handled in isolation, entertaining the motion in that case might not have been premature. However, as DABT noted in its initial brief, the trial court did not treat these cases separately. Instead DABT was required to meet not only the contentions raised by Tampa Crown at the summary judgment hearing, but the contentions of McKesson Corporation was (sic) well and, shortly thereafter, of Brown-Forman Corporation. The time and resources of DABT available to adequately prepare its defense in each case was thus divided by three. Moreover, although Tampa Crown argues that its case is purely a facial challenge to the statutes, it in fact engages in speculation as to what effect the statutes might have, without the benefit of any administrative or judicial interpretation of the statutes as applied to a concrete circumstance.

McKesson's argument that DABT was required to file an affidavit in order to demonstrate the need for more time to complete discovery is the exaltation of form over substance. The lack of response to the majority of DABT's discovery was apparent in the record and was before the trial court on the date of the summary judgment hearing, at which time DABT made its need for additional time known to the trial court. When it is apparent on the record that discovery has not been completed, summary judgment is premature.

Moreover, DABT's discovery did not address only the (sic) standing (sic) McKesson's standing, as implied by McKesson. The record reflects that Florida Beverage Corporation deals in the products exempted by these statutes and is therefore estopped to challenge the constitutionality of the very exemption it has enjoyed. R. Vol. 7, pp. 1170 - 1195, 1209 - 1211. *Hess v. Mullaney*, 213 F.2d. 635 (9th Cir. 1954); *In Re Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 713 F.2d. 274, 279 - 280 (7th Cir. 1983); *Wolfe v. Merrill Nat'l Lab., Inc.*, 433 F.Supp. 231 (M.D. Tenn. 1977); *McNulty v. Blackburn*, 42 So.2d. 445 (Fla. 1949). The record further reflects that Tampa Crown chooses not to deal in exempt products because it regards them as inferior. R. Vol. 7, pp. 1209 - 1211. Thus, Tampa Crown can not (sic) assert that its interests as a distributor are harmed in manner fairly

traceable to the operation of the exemptions. *E.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed. 2d. 700 (1982).

DABT propounded discovery to McKesson aimed at unearthing facts which would show that McKesson dealt in exempt products in the past, voluntarily discontinued such business, and had access to the distribution of exemption products currently, but chose not to distribute them. R. Vol. 1, pp. 8 - 10, 18 - 28. R. Vol. 2, pp. 229 - 248. Had DABT been permitted sufficient time to inquire into those areas, McKesson's complaint might, too, have been found to subject to estoppel. Still further, DABT's discovery inquired into whether McKesson had passed the financial burden of the taxes to its customers and therefore not suffered the burden of the tax itself. If so, McKesson would be barred from seeking a refund. *State ex. rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d. 529 (Fla. 1973). Further, such facts would favor the trial court's prospective-only ruling, which is the subject of McKesson's cross-appeal. *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, 373 N.W. 2d. 399, 408 - 411 (N.D. 1985).

IV

SUMMARY JUDGMENT BASED UPON ALLEGED INTRUSION INTO FOREIGN AFFAIRS UNDER DORMANT COMMERCE CLAUSE ANALYSIS WAS PREMATURE

As the court indicated in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, (1979), a case involving a Foreign Commerce Clause challenge to the California ad valorem tax on shipping containers, the basic analysis under the Foreign Commerce Clause tracks the four-prong inquiry used in the interstate context. The court identified two other factors that must be considered: "The enhanced risk of multiple taxation" in the international context (441 U.S. 446), and the possibility that state tax "may impair federal uniformity in an area where federal uniformity is essential" (Id. 448). There is no risk of multiple taxation in this case. The only inquiries then are whether there is discrimination against foreign commerce, which, as

demonstrated above, cannot be shown on this record, or whether the Florida law somehow impairs federal uniformity in an essential area.

In actually applying the "one voice" notion, the Supreme Court has recognized that the principal inquiry to be made is whether the federal government has chosen to mark out an area for uniform treatment through the exercise of its powers of preemption. However, where the federal government has not preempted state action, the courts should be hesitant to fashion their own version of preemption based solely upon the idea of "one voice" over foreign commerce. The decision in *Japan Lines* says nothing to the contrary on that issue.

It should be noted that the "one voice" standard suffers from the same central defect as the concept of "uniformity": it speaks only to one side of the balance at stake. As is the case in the field of interstate commerce, virtually any tax affecting foreign commerce can be said to affect uniform federal treatment and thus, under a rigid application the "one voice" principle, be impermissible. But that analysis ultimately does nothing more than restate the essential question, which is whether the tax so interferes with the need for one dominate (sic) power that it cannot stand. The answer to that question depends upon a sensitive balancing of the interests involved.

The Supreme Court, in fact, has recognized as much in *Container Corp. v. Franchise Tax Board*, 103 S.Ct. 2933 (1983). There the Court stated that, even absent preemption, the uniformity principal would be violated if the state tax "implicates foreign policy issues which must be left to the Federal Government." 103 S.Ct. 2955. However, the Court expressly cautioned that such foreign policy concerns had to be balanced against the "sovereign right of the United States as a whole to let States tax as they please". *Ibid.* The court in *Container Corp.* concluded that the balance in that case must be struck in favor of permitting the state to exercise its taxing power. The Supreme Court has also acknowledged that the "one voice" doctrine, if applied as strictly as Appellees urge, will lead the courts into difficult and uncertain inquiries. Thus, the court noted in *Container Corp.*, *supra*, that it has no special competence "in determining precisely when foreign nations will be offended by particular acts, and in deciding

deciding how to balance" ...foreign policy concerns against state taxing power. 103 S.Ct. at 2955. The problem is even more difficult when the issue arises, as it does here, in the context of garden variety commercial litigation. In cases like this one, the foreign policy concerns of the United States will often be presented by a taxpayer simply seeking to avoid a tax or to achieve a tax advantage rather than by the United States on its own behalf. The line between private economic concerns and foreign public policy concerns is thus particularly troublesome to discern. In the usual order of analysis, as is the case here, the courts will be faced with the argument that a state tax conflicts with "one voice" principle only after the parties have exhausted an attempt to show that the tax is discriminatory or not fairly apportioned. In such circumstances, it would be a rare case where the impact of the tax is so harmful to federal foreign policy on its face that it can not (sic) be said to co-exist with that foreign policy.

Thus, to hold that the Dormant Commerce Clause of its own force prohibits a state tax under the "one voice" analysis, the court should require, at a minimum, proof in a concrete context of how the tax truly interferes with important federal policy and, if so, why Congress or the Executive Branch has not taken steps to preempt the State's policy.

This case involves the exercise of the taxing power of the State of Florida on a subject over which the Twenty-first Amendment to the United States Constitution gives it broad latitude. Appellees therefore ought to be at least required to prove in a concrete circumstance their claim that the tax, as it operates, intrudes into an area where federal uniformity is "essential". There is nothing in this record of a concrete nature showing that the tax policy of the State of Florida cannot co-exist with Federal policy or causes any concrete threat of retaliation from foreign governments, which is the core concern behind the "one voice" doctrine. That analysis must be made on an as-applied basis. There is no proof in this record that the product of any foreign nation is or will be denied tax preferred status by reason of the disqualification provisions. If there is a specific circumstance in which the internal tax policy of Florida impinges upon federal foreign policy or Congressional acts regulating trade relations with foreign nations, then the issues are properly adjudicated in a proceeding which

such concrete facts. The Court should not accept appellees' invitation to speculate upon them here.

V

APPELLEES MAY NOT RELY UPON THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) NOR DO THE FLORIDA STATUTES CONTRAVENE GATT

The United States Congress has never ratified GATT. *U.S. v. Yoshida International, Inc.*, 526 F.2d 560, 575, n. 22(C.C.P.A. 1975). GATT is therefore not a treaty of the United States. See *Republic of Argentina v. City of New York*, 250 N.E. 2d 698 (NY 1969). Further, GATT does not by its terms confer a private right of action on nationals of the United States. Thus, even if one assumes that GATT creates a private right of action for its enforcement, such right would be available only to foreign nationals. Appellees are "not in the position to invoke the rights of other governments or the nationals of other countries" under GATT. *Skiriotes v. Florida*, 313 U.S. 69, 74 (1941); *Hjelle v. Brooks*, 377 F.Supp. 430 (D. Alaska 1974).

Further a treaty or international agreement may confer rights capable of enforcement by private parties, but this is not the general rule. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F. 2d. 1287, 1298 (3rd Cir. 1979). Unless a treaty or international agreement is self executing it must be implemented by legislation before it can give rise to a private cause by action. *Dreyfus v. Von Finck*, 534 F.2d. 24, 29 (2d Cir. 1976), *cert. den.* 429 U.S. 835 (1976). Article XXIV, section 6 of GATT, TAIS 1700, provides:

Each contracting party shall make such reasonable measures as may be available to it to assure observance by the regional and local governments and authorities within its territory.

That is exactly the same kind of provision, contemplating legislative action to implement the international agreement, that was held to be non-self-executing in *Mannington Mills, Inc. v. Congoleum Corp.*, *supra*.

Therefore these Plaintiffs may not rely upon GATT in support of their position.

Moreover Article III; section 2 of GATT provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

On their face the provisions of Florida's disqualification provisions impose no more stringent rules or regulations upon the receiving of a tax preference with regard to the articles of foreign commerce that are applied to the articles of national commerce and, accordingly, do not violate GATT.

VI

THE RECORD IS INSUFFICIENT TO SHOW THAT THE STATUTES' PRACTICAL OPERATION IS REPUGNANT TO THE POLICIES OF THE SPECIFIC ACTS AS CITED BY APPELLEES

In order to (sic) Appellees to successfully argue that the disqualification provisions of Florida Statutes violate federal policy under the Tariff (sic) Act of 1930 or the Trade Act of 1974, they must establish that the tax constitutes a protective trade barrier or, as Appellees phrase it, "an additional tax". McKesson answer brief at page 47. The statutes do not impose an additional tax on foreign commerce. They lay down conditions for the receipt of tax preference on the sale of beverages in Florida. For Appellees to successfully

prove that the tax is a protective barrier, it must be demonstrated that the tax in practical effect discriminates in favor of Florida products over foreign manufactured beverages. As demonstrated above, there is no proof of that in this record sufficient to warrant summary judgment.

There is no "irreconcilable conflict with federal regulation" under the Trade Act Of 1974 or the Tariff Act Of 1930 in Florida's taxation of beverages sold locally within its boundaries. There is no positive repugnancy between the policy embodied in those federal acts and Florida's decision to extend favorable tax treatment to beverages only if not being advantaged already. There is no express mandate in those Federal Acts that Congress intended to oust the powers of the states over the tax policy with respect to alcoholic beverages under the Twenty-first Amendment. *E.g. Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 81, 83 S.Ct. 1210(1963). Moreover, had the trial court determined that there was a preemption of the State's taxing policy insofar as matters of foreign trade are regulated by the Caribbean Basin Recovery Act or the Wine Equity And Export Expansion Act of 1984, such a determination would be insufficient to declare the statute unconstitutional on its face. Rather such a holding would have been an as-applied ruling, holding the disqualification provisions to be inapplicable in the case of trade covered by those Federal Acts. The trial court made no such determination. Instead the Court ruled the exemptions unconstitutional across the board.

Clearly, even if Plaintiffs had built a sufficient record to allow summary judgment on the pre-exemption issues, such would be insufficient to support summary judgment striking the exemptions on their face and across the board.

VII

THE DISQUALIFICATION PROVISIONS SHOULD BE CONSTRUED TO AVOID POINT-OF-ORIGIN DISCRIMINATION

Tampa Crown labors to establish that the disqualification provisions of §§564.06(9), 565.12(1)(c), (2)(c), Florida Statutes (1985) result in

(1985) result in facial "point-of-origin" discrimination. Tampa Crown's argument proceeds however upon its unstated assumption that those provisions are capable of only one construction - i.e. the interpretation put forward by Tampa Crown. Tampa Crown merely sets up a strawman so it can knock it down. Instead of the suspect interpretation put forward by Tampa Crown, the Court should adopt any construction which avoids constitutional problems. *Biscayne Kennel Club v. Florida State Racing Comm'n* (165 So.2d. 762 (Fla. 1964); *Tyson v. Lanier*, 156 So. 2d. 833 (Fla. 1963).

The provisions of the disqualification provisions reflect the reasonable inference that if direct or indirect subsidies are made available in a given jurisdiction, manufacturers will avail themselves of such benefits. A manufacturer making rum in a jurisdiction which offers export subsidies to rum made from local sugarcane is not likely to choose, instead, to import sugarcane from elsewhere and pay a higher price plus shipping costs. Thus, the language of the disqualification provisions is readily capable of the interpretation which does not hinge the Florida tax preference solely upon the policies of the manufacturing jurisdiction without regard to whether the manufacturer actually receives the benefit of those policies. One of the disqualifying criteria is applied to beverages from jurisdictions "which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries." §564.06(9)(b), Fla. Stat. (1985). It is reasonable to construe that language to mean that such advantages must actually be provided to the manufacturer seeking Florida's preference in order for the disqualification to operate. Given that construction, the disqualification is not based upon some general policy of the other jurisdiction, but upon provision of financial benefits directly to a specific manufacturer which is seeking further tax encouragement here. The provisions of §564.09(c), Fla. Stat. (1985) are equally amenable to the same interpretation. The provisions of §564.09(a) can also be interpreted as operating not just upon a point-of-origin basis, but upon the actual receipt of financial incentives elsewhere. If a jurisdiction provides home territory trade protection to its manufacturers, all of those manufacturers necessarily enjoy a financial encouragement in the home market which allows them to compete

more effectively elsewhere; they may export that incentive by lowering prices on products they export, since products they sell locally can be priced higher due to protection from outside competition. Thus, the disqualification operates not on the point-of-origin, but upon the actual receipt of financial encouragement by the manufacturer.

Similarly, when one bears in mind the duty to seek a constitutional interpretation of legislative enactments, Tampa Crown is incorrect in stating that a de minimis benefit elsewhere would operate to deny Florida tax preference. Clearly the foreign benefit must be substantial to deny tax preference here. That the statute does not contain a formula for mathematical equivalence is not surprising. The value of a price support or an export subsidy (or a tax barrier in another local market) fluctuates depending upon overall market conditions. No formula is available to cover such constant fluctuations. The inability to create symmetry and balance, or a precise formula does render the statute unconstitutional. See *Straughn v. K & L Land Mgt., Inc.*, 326 So. 2d. 421 (Fla. 1976); *Askew v. Cross Key Waterways*, 372 So.2d. 913, 919 (Fla. 1979).

The decision in *Askew v. Cross Key Waterways*, is also instructive with regard to Appellees' assertion that the language of the disqualification provisions is too broad and therefore constitutes an invalid delegation of legislative power:

We emphasize that it is not the legislature's use of the phrases "containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional impact" nor "significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment" which faults the legislation. Although the Court in *Sarasota County v. Barg*, supra, invalidated an act which utilized the terms "undue or unreasonable" dredging or filling and "unreasonable" destruction of natural vegetation in a manner which would be "harmful or significantly contribute (sic)" to air and water pollution, such quantitative assessments by an administrative agency are not necessarily prohibited. As suggested by the

district court of appeal such "approximations of the threshold of legislative concern" are not only a practical necessity in legislation, but they are now amenable to articulation and refinement by policy statements adopted as rules under the 1974 Administrative Procedure Act, Chapter 120, Florida Statutes. The benefits of the current version of Chapter 120 were not available at the time of the *Barg* decision. The deficiency in the legislation here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest.

Id. at 919. See also, *Straughn v. K & K Land Mgt., Inc.*, *supra* (upholding provision for denying agricultural tax break under certain circumstances unless the property owner can show "special circumstances demonstrating that the land is to be continued in bona fide agriculture.")

Under the analysis of those cases, the provisions of the instant statutes relating to disqualifying criteria are sufficient "approximations of the threshold legislative concern": to limit the loss of tax revenue where the manufacturer of an otherwise qualifying beverage has already received financial encouragement to market it. As the Court noted in *Askew v. Cross Key Waterways*, that threshold standard may be fleshed out in administrative regulations and §120.57 proceedings. Those mechanisms are adequate to determine whether a manufacturer has in fact benefitted from financial advantages elsewhere and, if so, whether that benefit is substantial or insubstantial. Administrative Agencies and the courts, see §120.68, Fla. Stat., are as equally equipped to make those determinations as they are to decide the degree of contributory fault in a tort case or "The probable economies and improvements in service be derived from operation of joint or shared h(sic) are (sic) resources.", §381.494(6)(c) 5., Fla. Stat. (1985).

ASSUMING THE TRIAL COURT'S CONSTITUTIONAL RULING TO BE CORRECT THE TRIAL COURT PROPERLY GAVE ITS RULING ONLY PROSPECTIVE OPERATION

The arguments DABT is about to make will demonstrate that the reasoning and the precedents relied upon in McKesson's cross-appeal as to the prospective-only ruling below are inapposite. Before doing so, however, DABT, wishes to point out that the argument over whether the trial court's ruling should or should not be given only prospective effect is largely academic, because even if the trial court had not expressly made its ruling prospective, McKesson would not be entitled to a refund of beverage excise taxes. McKesson has not challenged the imposition of the flat beverage tax, but rather only the alleged discriminatory effect of the tax preference provisions of §564.06 and §565.12. Thus, if the trial court's constitutional analysis were correct, only the exemption provisions are invalid and those exemptions were properly severed from the statute, as the trial court did. *Delta Airlines, Inc. v. Department of Revenue*, 455 So.2d 317, 321 (Fla. 1984), *Presbyterian Homes of Synod of Florida v. Wood*, 297 So.2d. 556, 559 (Fla. 1974). With the exemptions removed, all beverage distributors are responsible for collecting and remitting the beverage excise taxes at the higher rate. McKesson cannot assert the exemptions to be unconstitutional and at the same time demand their benefit by demanding a refund of taxes paid in excess of the exempt rate. See, e.g. *Daniel v. Canterbury Towers, Inc.*, 462 So.2d. 497 (Fla. 2d. DCA 1985). McKesson cannot avoid that obvious inconsistency (sic) by characterizing the refund claim as one for damages against the state for alleged injury to its business. A damage claim will not lie for fundamental acts of governance, including the enactment of legislation, *Trancon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d. 912, 918 - 919 (Fla. 1985), and a tax refund claim cannot be made on such a theory, since it flies in the face of sovereign immunity. *Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S.W. 2d. 1174 (1937).

Having said that, DABT asserts that the trial court was amply justified in giving prospective-only effect to its judgment, assuming that judgment to be correct.

The decision in *Great Northern Ry. Co. v. Sunburst Oil Co.*, 287 U.S. 358 (1932), laid to rest the debate over the power of the courts to fashion their decrees on the constitutionality of statutes in such a manner that those decrees operate only prospectively. Since the advent of the *Sunburst* doctrine, scores of decisions, both in the Federal courts and in the courts of the several States, have been given only prospective operation, thus denying retroactive relief such as a refund of monies paid to a State's treasury under statutes found to have a constitutional defect. E.g., *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463 (1973); *Gulesian v. Dade Cty. Sch. Bd.*, 281 So.2d 325 (Fla. 1973); *International Studio Apt. Ass'n v. Lockwood*, 421 So.2d 1119 (Fla. 3d DCA 1982) *pet. for rev. den.* 430 So.2d 451 (Fla. 1983), *cert. den.* 464 U.S. 895 (1983); *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, 373 N.W. 2d 399 (N.D. 1985). This Court has done so. E.g., *Gulesian v. Dade County Sch. Bd.*, *supra*. Of the numerous cases which have discussed and applied the *Sunburst* doctrine, the most succinct analysis of the rationale for it and the circumstances conducive to its application can be found in *Lemon v. Kurtzman*, *supra*, and in *Metropolitan Life Insurance Company v. Commissioner of Insurance*, *supra*.

In *Lemon v. Kurtzman*, the court struck down a statute allowing public funds to be paid to sectarian schools to reimburse them for the expense of providing non-sectarian education. Nevertheless, the court gave its decision only prospective application, thus denying the plaintiffs' demand for a refund of monies paid under the unconstitutional scheme. The Court's reasoning is instructive here:

Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs

are 'ratified' by the federal courts or risk draconian, retrospective decrees should the legislation fall. In our view appellants' position would seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers... have the power to carry forward the directives of the state legislature...[W]hen there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in the post hoc evaluation of such political judgment, founded as it is on one of the first principles of constitutional adjudication - the basic presumption of the constitutional validity of a duly enacted state or federal law.

Lemon v. Kurtzman, *supra*, 411 U.S. 207-208, 93 S.Ct. 1473, 36 L.Ed. 165-166.

In *Metropolitan Life Insurance Co. v. Commissioner of Insurance*, *supra*, the Court held unconstitutional North Dakota's tax preference for domestic insurance companies. However, the Court refused to give retrospective application to its ruling, and denied the plaintiffs' demands for refunds of taxes previously paid under the statute. The decision in that case is nearly "on all fours" with this case. The North Dakota court denied tax refunds to the plaintiffs because: (1) the decision of the United States Supreme Court in *Metropolitan Life Insurance Co. v. Ward*, 105 S.Ct. 1676 (1985), which occasioned the North Dakota decision, constituted a newly announced principle of constitutional law and the state therefore was justified in relying upon the presumed constitutionality of the statute in question; (2) the State acted to address the constitutional defect announced in the *Ward* decision; (3) the prior statute had long been in effect without protest before the *Ward* decision; (4) serious economic dislocation for the state would have occurred by the imposition of retroactive relief; and (5) the plaintiffs had not shown real injury as taxpayers because they had shifted all or most of the financial burden of the tax to their customers in the form of higher prices and thus would receive an unjustified windfall by the granting of refunds.

Each of those considerations applies with equal, if not more compelling, force here.

A.

BACCHUS IMPORTS, LTD. v. DIAS WAS A NEW PRINCIPLE OF LAW

The majority holding in *Bacchus* was accompanied by a strong dissent which characterized the majority's decision as a clear departure from prior decisions and a "totally novel approach to the Twenty-first Amendment". *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 3064, 82 L.Ed. 2d. 200 (1984). That characterization is well supported. For decades prior to the *Bacchus* case, the United States Supreme Court had rebuffed Commerce Clause challenges to the State's taxation and regulatory laws which favored local alcoholic beverage industries, and did so on the express ground that the Twenty-first Amendment removed Commerce Clause strictures on the States in regard to the regulation of the sale and distribution of alcoholic beverages. *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 390 (1939). Thus, the *Bacchus* decision constituted a new principle of law. See, *Metropolitan Life Ins. Co. v. Commissioner of Insurance*, *supra*; *Gulesian v. Dade County Sch. Bd.*, *supra*; *International Studio Ap't. Ass'n v. Lockwood*, *supra*.

B.

THE STATE JUSTIFIABLY RELIED UPON THE VALIDITY OF ITS TAX STATUTES

Just as North Dakota justifiably relied upon the long and unprotested existence of its tax format, *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, *supra*, Florida justifiably relied upon the taxation format for alcoholic beverage prior to *Bacchus*. Until the advent of *Bacchus* the general wisdom was that the Twenty-first

Amendment removed Commerce Clause restrictions on the States' taxation and regulation of alcoholic beverages imported into the States for consumption.

C.

THE STATE ACTED PROMPTLY AND REASONABLY IN RESPONSE TO BACCHUS

In the next ensuing legislative session after *Bacchus* the Legislature substantially amended the statutes to address what it perceived to be the Commerce Clause defect announced in *Bacchus* - the granting of an exclusively local tax preference to alcoholic beverages. In making that statement, DABT does not ignore the possibility of protectionist motives on the part of some legislators with regard to the 1985 amendments. However, as discussed above in point I, such motivations on the part of some cannot be said to be true of the body corporate. Nor does DABT ignore the fact that reasonable men may differ as to whether the 1985 amendments cured the constitutional defects announced in *Bacchus* and as to whether other constitutional problems may inhere in those amendments. What may not be disputed, however, is that the trial court, with the benefit of the record and exhaustive arguments of counsel, made a finding that the 1985 amendments "were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverage laws resulting from the *Bacchus* decision". Whether the Legislature succeeded or not, the trial court's finding, supported by ample evidence, establishes the bona fides of the State in making the attempt. The State has thus satisfied the prompt action component of the prospective-only calculus.

It goes without saying that the pre-1985 statutes were not subject to any protest regarding their constitutionality and prior precedents amply supported the constitutional presumption for those laws. Nor did these plaintiffs act with any alacrity in asserting the new statutes to be unconstitutional. The 1985 amendments became effective July 1, 1985. McKesson - the only appellee to cross-appeal the prospective-only ruling - did not file suit until September, 1986. By way of a

comparative benchmark, the Court need only look to the current cases filed regarding the constitutionality of Florida's new sales tax on services.

D.

SERIOUS DISLOCATION WOULD OCCUR BY GRANTING RETROSPECTIVE RELIEF

There can be no dispute that the refund of millions of dollars from state revenues at a time when the State is struggling to find revenues to pay for billions of dollars in infrastructure needs would be a serious financial hardship. Record support for that conclusion is evident in the elaborate sliding scale tax for beverage tax exemptions designed to check erosion of the beverage excise tax base.

E.

MCKESSON MAY NOT ASSERT HERE THAT IT DID NOT PASS THE FINANCIAL BURDEN OF THE TAX TO ITS CUSTOMERS

The only piece of the calculus for prospectivity at all in question is whether McKesson passed the financial burden of the tax on and thus would receive a windfall by receiving a refund. Before addressing that issue, however, DABT wishes to note that such a finding, while sufficient to justify a prospective ruling, is not necessary to support the trial court's exercise of equitable discretion in granting prospective-only relief. Indeed, in *International Studio Apartment Ass'n v. Lockwood*, *supra*, the plaintiffs' financial loss was deemed insufficient reason to justify a retrospective ruling on constitutionality. See also *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978).

Let us turn, now, to the financial burden of this tax. DABT propounded discovery to McKesson aimed at proving that McKesson had, indeed, passed the financial burden of the excise tax to its customers. R. Vol. 1, pp. 229 - 248. McKesson refused to respond to that discovery, despite the fact that it was clearly relevant to

McKesson's claim of refund. *State ex. rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1974). If that missing piece were error (it is not, as demonstrated above), McKesson, having invited it, may not now rely upon it for reversal of the trial court's prospective-only decision. See, e.g., *Stossel v. Gulf Life Ins. Co. of Jacksonville*, 123 Fla. 227, 166 So. 821 (1936).

Even without McKesson's response to that discovery, there is adequate support for the trial court's prospective ruling. The Legislature clearly contemplated that, although the legal incidence of the excise tax falls upon distributors such as McKesson, the distributors would be mere collection conduits for the tax. See, §561.50, Fla. Stat. (1985) (tax not due until sale); §561.506, Fla. Stat. (1985) (Wholesaler deductions from tax collection payments); §565.13 Fla. Stat. (1985) (tax not due until 10th of month following month of sale). Indeed, since a price given to one customer by a distributor must be given equally to all under Florida's regulatory scheme, Rule 7A - 4.471, F.A.C., and since the amount of the tax is large in relation to the relatively low unit price of alcoholic beverages (\$9.53 per gallon on distilled spirits with more than 48% alcohol), economic necessity virtually compels a pass-through of the financial burden of the tax.

The cases McKesson relies on are inapposite. The Court in *Bacchus* made clear that the *Bacchus* decision did not consider the demand for refunds. 104 S.Ct. 3049, 3059. The case of *State Ex. rel. Nuveen v. Greer*, 89 Fla. 249, 102 So. 739 (Fla. 1924) predates the decision in *Great Northern Ry. Co. v. Sunburst Oil Co.*, *supra*. The *Sunburst* case eschewed the precedents relied upon in the *Nuveen* case. *Nuveen* is directly contrary to modern precedents on the prospective-only application of judicial decisions, both in Florida and in the Federal Courts. Compare *Lemon v. Kurtzman*, *supra*; *City of Los Angeles Dep't. of Water & Power v. Manhardt*, *supra*; *Gulesian v. Dade Cty. Sch. Bd.*, *supra*. Modern Florida cases have allowed litigants to recover refunds only when the applicants bore the financial burden of the tax as end-consumers or property owners, in the case of

ad valorem taxes.² In contrast, this Court held that no refund is due in cases where the taxpayer, although being the one upon whom the legal incidence of the tax falls, is not the party who bears its financial burden. *State ex. rel Szabo Food Service, Inc. v. Dickinson, supra. Accord, Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S.W. 2d. 1174 (Ky. 1937). As demonstrated above, that is precisely the circumstance of McKesson.

CONCLUSION

DABT urges the Court to hold that the 1985 amendments to §§564.06 and 565.12, Florida Statutes, do not violate the Commerce Clause, either facially or in practical effect; and to reverse the trial court's summary judgment. Further, DABT urges the Court to hold that the record does not support summary judgment on any alternative ground advanced by Appellees. In the alternative, DABT urges the Court to sustain the trial court's decision to grant prospective-only effect to its ruling.

Respectfully submitted

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² *Ostendorf v. Turner*, 426 So.2d. 539 (Fla. 1982); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993 (Fla. 1976); *Colding v. Herzog*, 467 So.2d 980 (Fla. 1985); *City of Tampa v. Birdsong Motor, Inc.*, 261 So.2d. 1 (Fla. 1972); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d. 578 (Fla. 1984).

SUPREME COURT OF THE STATE OF FLORIDA

(Caption omitted in printing)

CASE NO: 70,368 ON APPEAL FROM THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA
CASE NO. BS-402

APPELLEE AND CROSS-APPELLANT MCKESSON CORPORATION'S REPLY BRIEF

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INTRODUCTION

McKesson¹ in the Circuit Court in October, 1986, argued that the Revised Florida Products Exemption impermissibly discriminates against interstate commerce in violation of the Commerce Clause, impermissibly involves Florida in foreign affairs, and impermissibly discriminates against foreign imports in violation of the Import-Export Clause. (A. 306-492.) The Circuit Court predicated its finding of unconstitutionality upon the Commerce Clause and, therefore, did not reach McKesson's other constitutional arguments. The Court stated that its declaration would operate only prospectively. (A. 278-80.)

Appellants' Initial Briefs only discussed McKesson's Commerce Clause argument and did not discuss the Circuit Court's decision to enter a prospective ruling. McKesson, in its Answer Brief, responded to Appellants' arguments concerning the Commerce Clause, addressed McKesson's other constitutional arguments, and criticized the Court's prospective ruling. Appellants, in their Reply Briefs, responded for the first time to all McKesson's Circuit Court arguments. In accordance with this Court's Rules, McKesson assumes that it cannot respond to Appellants' arguments concerning the Commerce Clause in this Reply Brief and directs this Court to its Answer Brief. McKesson assumes that it may address Appellants' new arguments in this Reply (within the 15 page limitation).

Therefore, in responding to Appellants' new arguments, McKesson, in this Reply, discusses the Florida statutes' unconstitutional interference in foreign affairs; the Florida statutes' unconstitutional discrimination against foreign imports; and the Circuit Court's error in declaring that its ruling would operate only prospectively.

¹ McKesson adopts in this Reply the abbreviations that it used in its Answer.

I. THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

McKesson maintains that the Revised Florida Products Exemption violates the federal Constitution by involving Florida in foreign affairs. Under the Supreme Court's decisions, this Court must declare the Florida statutes unconstitutional if the statutes *either* implicate Florida in foreign affairs *or* directly conflict with federal law. *See Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300 (Ill. 1986).

With respect to the first basis for a finding of unconstitutionality, Appellants argue that the Florida statutes do not implicate Florida in foreign affairs because the statutes do not require a judging of foreign countries' policies. Todhunter and Jacquin assert that "the Florida statutes do not attempt to change any nation's policies." (Todhunter and Jacquin's Reply at 16.) In fact, the Florida statutes specifically sanction any foreign country with suspect economic policies by discriminating against the country's exports. §§ 564.09 and 565.12, Fla. Stat. (1985). The State, in these very proceedings, has represented that the Florida tax statutes permit Florida to make determinations about foreign countries' economic policies in order to "discourage the implementation or continuance of purely local favoritism in other jurisdictions." (A. 565.)

The Illinois Supreme Court's analysis in *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300 (Ill. 1986), provides a paradigm for this case.² The Illinois Court, applying *Bacchus*, determined that a payer of an Illinois tax had standing to challenge its constitutionality under the foreign affairs doctrine. The Court proceeded to find unconstitutional an Illinois tax, which granted tax exemptions on currency dealers' sales of currency of all countries but South Africa, as an intrusion into the federal government's exclusive power over

² *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), does not speak to this case. *Container Corp.*, which concerns a state's latitude in apportionment of corporations' foreign and domestic income, does not provide a constitutional rule for reviewing a state's attempt to discriminate against foreign countries' exports.

foreign affairs. "[D]isapproval of the political and social policies of a foreign nation," the Court opined, "does not provide a valid basis for a tax classification by this State." *Id.* at 307.

With respect to the second basis for a finding of unconstitutionality, Appellants argue that the Florida statutes do not interfere with federal laws and executive agreements.³ The State, which claims that the statutes do not discriminate against foreign goods, finds no conflict between the state statutes and federal law. In fact, McKesson's analysis of the Caribbean Basin Economic Recovery Act provides only one example of a conflict. Under CBERA, the United States offers trade advantages to Caribbean nations in order to encourage "one-way free trade." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (reprinted in 1983 U.S. Code Cong. & Admin. News at 643, 644). The United States hopes to promote political and economic stability in the Caribbean by encouraging its nations to export their products to the United States. H. Rep. No. 98266, 98th Cong. 1st sess., at 3 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 644).

The revised Florida Products Exemption, which promotes Florida products at the expense of the Caribbean's products, obviously undercuts CBERA. At the same time the United States has *decreased* the price of Caribbean rum through an exemption from customs duties, the Florida statutes through the Take Back Provisions have *increased* the price. Florida's efforts to favor Florida producers at the expense of foreign producers directly collides with the United States' efforts, through CBERA and other acts, to grant some foreign nations, such as the Caribbean nations, certain international trade advantages.

Appellants claim that as long as McKesson cannot identify a country whose exports cannot qualify for Florida's preferences, a

³ The State's comments about GATT are a puzzle. McKesson's Answer noted that McKesson's standing to raise an argument under GATT does not depend upon GATT's being a treaty. GATT, as an executive agreement, supercedes Florida law by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2. See *United States v. Belmont*, 301 U.S. 324, 331-32 (1937). State statutes that contravene GATT by placing restrictions on the sale of foreign imports are unconstitutional. E.g., *Territory v. Ho*, 41 Haw. 565, 567-71 (1955).

ruling on constitutionality would be premature. In fact, in the Circuit Court, McKesson specifically identified a Caribbean nation, Barbados, and Mt. Gay Rum, its export, as victims of Florida's interference in foreign affairs. (A. 367-68.) Barbados has designated its sugar and rum industries, as a "basic industries," has provided the industries a special capital investment allowance twice as large as many other industries, and has authorized rebates on taxes payable on profits for exports to the United States. See Barbados Income Tax Act of 1982, Div. H, § 12, and Regulations, Part IV, § 7; Price Waterhouse, *Corporate Taxes: A Worldwide Summary* at 18-22 (1986); Diamond, *Foreign Tax and Trade Briefs*, §§ 4.5-20 (1985). If Barbados' economic benefits for its sugar and rum industries do not equal, in the Take Back Provisions' words, "economic incentives or advantages" or "export subsidies," the Take Back Provisions are meaningless. The State cannot constitutionally force McKesson to litigate in an administrative proceeding what any Florida court may judicially notice. Fla. Evid. Code § 90.202(4) (1986) (judicial notice of foreign laws). The convening of an administrative proceeding would result in an unconstitutional investigation of foreign affairs. See *Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct.[sic] 664, 19 L.Ed.2d 683 (1968).⁴

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE.

McKesson maintains that the Revised Florida Products Exemption conflicts with the Import-Export Clause's prohibition on any discriminatory state tax on imported goods. The Revised Florida Products Exemption, through its Take Back Provisions, unconstitutionally permits Florida to deny tax exemptions to foreign

⁴ Appellants' suggestion that the Twenty-first Amendment, which allows Florida to regulate the consumption of alcoholic beverages within the state, permits discrimination against foreign imports is frivolous. The Supreme Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), concluded that the Amendment does not save a discriminatory tax scheme: the "central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." See also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. ___, 106 S.Ct. 2080, 90 L.Ed.2d 552, 563-64 (1986).

alcoholic beverages solely on the basis of the beverage's country of origin. See *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276, 283, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976).

Specifically, the Florida statutes' Take Back Provisions expressly empower Florida courts and officials to examine the agricultural and trade policies of foreign governments in light of the Provisions' restrictions. This statutory examination presupposes calculated discrimination against specific countries. In effect, Florida's statutes require Florida to impose different taxes on the products of different countries solely on the basis of the place of origin.

The Import-Export Clause does not permit the Revised Florida Products Exemption's approach to taxation. In *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976), the Supreme Court made clear that a state tax may not constitutionally "fall on imports as such because of their place of origin." *Id.* at 286. Although the Import-Export clause does not accord imported goods preferential treatment, it "clearly prohibits state taxation based on the foreign origin of the imported goods." *Id.* at 287. See also *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964); *Miller v. Publiker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984).

Appellants argue that the Revised Florida Products Exemption does not tax foreign alcohol on the basis of place of origin. (State's Brief at 29; Jacquin's Brief at 5; Todhunter's Brief at 11.) Jacquin and Todhunter, who profit from the Florida statutes' discrimination against foreign goods, predicate their argument on the assertion that "only if the product has already received a benefit" will the product face higher Florida taxes. (Jacquin and Todhunter's Reply at 14.)

In fact, the Revised Florida Products Exemption requires the Florida Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, to make determinations on the basis of the policies of individual countries and not on the basis of a particular manufacturer's economics. A country which "discriminates" against foreign alcoholic goods, which provides "economic incentives or

advantages" for its own goods, or which provides "export subsidies" for its own agricultural products will lose the benefits of Florida's preferences and exemptions for *all* its products and not merely for the beneficiaries of the particular policies. As a result, a manufacturer, whose country pursues policies which Florida disfavors, will not qualify for an exemption even though the manufacturer receives absolutely no benefit from the country's policies. See §§ 564.06(9) and 565.12(1) (c) and (2) (c).

In its Reply, the State apparently concedes that the Revised Florida Products Exemption will permit Florida to establish different tax rates for different countries. (State's Reply at 23-27.) The State suggests that this Court permit the State to rewrite the Florida statutes through administrative regulations so that the Take Back Provisions do not operate on the basis of place of origin. (State's Reply at 24.) In other words, the State, which contends that the Florida statutes do not require investigations into other countries' internal affairs, would permit the Division not only to determine foreign countries' policies but also to gauge their impact on particular foreign nationals. Constitutional protections for commerce "cannot be made to depend on the good grace of the state agency." *Brown Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. ___, 106 S.Ct. 2080, 2086 n.5 (1986). The Florida statutes, of course, provide no guidance for such agency determinations.

Either as written by the legislature or as rewritten by the State, the Florida statutes grant far too much latitude to the State to discriminate against foreign products on the basis of place of origin. The State's inquiry would deny some foreign products an exemption solely because specific countries have adopted certain policies. The Import-Export Clause does not allow Florida to implement statutory schemes that result in tax discrimination on the basis of place of origin. *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

III. McKESSON IS ENTITLED TO A REFUND OF THE UNCONSTITUTIONAL TAXES.

McKesson has established that Florida has imposed discriminatory taxes on McKesson's products under the Revised Florida Products Exemption in violation of the United States Constitution. Under Florida law, as well as federal law, the remedy for McKesson's constitutional injury is a refund.

A. Florida's Tax Statutes Mandate McKesson's Receiving a Refund.

The State's discussion of McKesson's right to a refund under the Florida tax statutes mysteriously fails to discuss Florida's statutory scheme.

Florida has determined by statute who shall bear the burden of the alcoholic beverage tax. The Revised Florida Products Exemption specifically imposes the burden of the tax on "manufacturers and distributors." §§ 564.06(1), (3), and (4), and 565.12(1) and (2), Fla. Stat. (1985).

Florida also has determined by statute who shall receive a tax refund under the alcoholic beverage tax statutes. McKesson seeks its tax refund under section 215.26, Florida Statutes (1985). Section 215.26 provides that the comptroller shall pay the tax refund to the person who paid the tax. McKesson, as a distributor of alcoholic beverages at wholesale, has in fact paid the excise taxes on its alcoholic beverages under the discriminatory tax statutes. (A. 365-66.) Therefore, McKesson is entitled to the refund.

Florida's statutory scheme represents the Florida legislature's decision concerning who must pay taxes and who may receive a tax refund. The Florida legislature demonstrably knows how to construct a pass-on tax. For example, Florida's motor fuel tax, section 212.62 (2)(a), Florida Statutes (Supp. 1987), expressly provides that "[t]his levy of tax is upon the ultimate retail consumer." The dealer, as a matter of "administrative convenience," acts as agent for the state in

collecting the tax. See also § 212.07, Fla. Stat. (Supp. 1987) (sales tax). The Florida legislature's statutes for alcoholic beverage taxation, in contrast, do not create a pass-on scheme.

Although the State invites this Court to rewrite Florida's tax statutes so that the State may preserve its unconstitutional taxes on McKesson from a statutory refund, this Court must decline the invitation as it has in similar cases.

For example, in *State ex rel. C.P.O. Mess (Open) v. Green*, 174 So.2d 546 (Fla. 1965), addressing another alcoholic beverage tax statute, this Court construed identical statutory language as imposing a tax directly on the manufacturer or distributor and not on the ultimate consumer. In *Green*, several military entities successfully sought a refund of certain alcoholic beverage excise taxes on federal constitutional grounds. The Court noted that the amended statute formerly provided that "there shall be paid by all manufacturers and distributors" a particular tax. *Id.* at 548. The same language is found in sections 564.06 and 565.12, Florida Statutes (1985). See §§ 564.06(1), (3), and (4), and 565.12(1) and (2). The Court found that the cited language "was clearly a tax to be paid by the manufacturers or distributors -- not the purchasers or consumers." 174 So.2d at 549 (emphasis in the original). See also *Dade County v. Atlantic Liquor Co., Inc.*, 245 So.2d 229 (Fla. 1970) (alcoholic beverage excise tax statute imposed the tax burden upon manufacturers and distributors, not upon the ultimate purchaser).

This Court has required specificity from the legislature for the creation of a pass-on tax. In *United States v. Lee*, 153 Fla. 94, 13 So.2d 919, 921-22 (1943), the Court held that a gasoline tax statute imposed the tax upon the dealer rather than the consumer, even though language in the statute indicated that the consumer ultimately paid the tax. Although "the consumer ultimately pays the tax" by allowing dealer a "sufficient margin" for the dealer's overhead, the tax "does not amount to a tax on the consumer." *Id.* at 921.⁵

⁵ The United State Supreme Court and other federal courts have also rejected as irrelevant and impracticable the State's theories concerning pass-on in analogous cases. See, e.g., *Armco, Inc. v. Hardesty*, 467 U.S. 638,

B. Florida Law Requires McKesson's Receiving Retrospective Relief.

The State also ignores Florida law in discussing McKesson's entitlement to retrospective relief. Over the past 15 years, in resolving challenges to various Florida tax schemes, this Court consistently has held that those taxpayers who actually file the challenges are entitled to the statutory tax refunds, even if non-litigants do not receive any retrospective relief. See *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972), *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993, 995 (Fla. 1976), *Osterndorf v. Turner*, 426 So.2d 539, 541, 545 (Fla. 1982), *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984), and *Colding v. Herzog*, 467 So.2d 980, 982 (Fla. 1985).

The State cites a Florida decision and a North Dakota decision to support its argument for denying McKesson a remedy for its constitutional injury. Both cases, *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973), and *Metropolitan Life Ins. Co. v. Commissioner of Dept. of Ins.*, 373 N.W.2d 399 (N.D. 1985), denied retroactive relief because, among other reasons, the taxing authority in each case properly assumed the constitutionality of the tax statute. The State cannot make that argument in this case.

The State erroneously asserts that *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), established a new principle of law, and that Florida, therefore, justifiably relied on prior constitutional law in administering its alcoholic beverage tax statutes.⁶ The State apparently

644-45, 645 n.8, 104 S. Ct. 2620, 81 L.Ed.2d 540 (1984); *Gurley v. Rhoden*, 421 U.S. 200, 204-06, 211, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493-94 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968); *Nat'l Meat Ass'n v. Deukmejian*, 743 F.2d 656, 661-62 (9th Cir. 1984), *aff'd*, 469 U.S. 1100, 105 S. Ct. 768, 83 L.Ed.2d 766 (1985).

⁶ Only the minority in *Bacchus* believed that the majority established new law. *Bacchus*, of course, applied firmly established Commerce Clause doctrine. See, e.g., *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977).

hopes this Court will forget that the Florida legislature enacted the Revised Florida Products Exemption *after* the *Bacchus* decision. Further, in revising the former Florida Products Exemption, the legislature promptly acted not to eliminate the protectionism in the old scheme but rather to preserve the old protectionism in new language.⁷

To preserve unconstitutional protectionism, the legislature enacted the tax statutes after *Bacchus* and *Delta Air Lines*, as well as numerous other Commerce Clause cases, plainly circumscribed the State's latitude in promoting its own industry. The State's inaccurate history of the Florida legislature's errors does not support this Court's reversing its own precedent to allow the State to retain the benefits of its unconstitutional tax scheme.⁸

C. This Court's Severance of the Unconstitutional Tax Provisions Will Not Remedy McKesson's Constitutional Injury.

Finally, the State argues that this Court's severing the unconstitutional tax preferences will cure the constitutional injury and therefore negate McKesson's claim for a refund. The State, however, ignores a fundamental distinction.

If the State merely argued that this Court's prospective severance of the discriminatory provisions, eliminating preferences and

⁷ McKesson, in its Answer, cited this Court to the statements of the revised law's legislative sponsors, articulating the law's protectionist purpose. Appellants, in response, cite the statements of the Secretary of the Florida Department of Business Regulation, who wrote two memoranda to the Governor's office warning that the revised Exemption was unconstitutional, and the statements of a lobbyist representing Florida liquor distillers. (Compare Jacquin and Todhunder's Reply Brief at 8-9 and A. 479-85.)

⁸ The State also cites *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). In *Lemon*, the Supreme Court, unlike this Court, neither considered a taxpayer's claim for relief from a discriminatory tax burden, nor addressed a statute mandating a tax refund as the remedy for the discrimination.

exemptions, would eliminate any *prospective* injury to McKesson or any other distributor, McKesson would agree. See *Delta Air Lines, Inc. v. Dept. of Revenue*, 455 So.2d 317, 321 (Fla. 1984). Obviously, when the favoritism for parochial products ends, the unconstitutional discrimination also ceases.

However, if the State means to argue that this Court's prospective severance of the discriminatory provisions will eliminate the injury to McKesson that the discriminatory taxes have already caused, the State fundamentally misunderstands the doctrine of severance. See *Westinghouse Electric Corp. v. Tully*, 470 N.E. 2d 853, 854, 856-57 (N.Y. 1984). In *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247, 52 S.Ct. 133, 76 L.Ed. 265 (1931), a constitutional challenge to discriminatory taxation, the United States Supreme Court stated:

The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that the taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

The Florida legislature has not decided to "retroactively sever" the Florida statutes' discriminatory tax preferences and exemptions and impose a retroactive tax burden, without the preferences and exemptions, upon the favored manufacturers and distributors. The State does not propose retroactive severance, and the intervenors understandably do not mention it.

Accordingly, McKesson's only remedy under Florida law for its constitutional injury is an appropriate tax refund.

CONCLUSION

McKesson respectfully asks the Court to end Florida's violation of the federal Constitution's proscriptions by, first, affirming the Circuit Court's declaration of unconstitutionality and, second, directing the Circuit Court to award McKesson a tax refund of the difference between what McKesson paid in taxes and what McKesson would have paid if its products had received the same treatment as the favored products.

Dated: May 28, 1987.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

NO. 70,368

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, and OFFICE
OF THE COMPTROLLER, STATE OF
FLORIDA, ET AL., Appellants/Cross-Appellees,

VS.

MCKESSON CORPORATION, ET. AL., Appellees/Cross-
Appellants.

[February 18, 1988]

EHRlich, J.

On June 29, 1984, the United States Supreme Court decided the case of *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984). In *Bacchus*, the Court struck down a Hawaii alcoholic beverage excise tax which exempted okolehao, a brandy distilled from the root of an indigenous shrub of Hawaii, and fruit wine manufactured in the state as being violative of the Commerce Clause, concluding that the exemption had both the purpose and effect of discriminating in favor of locally produced products. At the time of the *Bacchus* decision, sections 564.06 and 565.12, Florida Statutes (Supp. 1984), granted tax preferred treatment to alcoholic beverages made from certain base agricultural crops grown in Florida and manufactured and bottled in Florida. In response to the *Bacchus* decision, the Florida Legislature amended sections 564.06 and 565.12 in Chapters 85-203 and 85-204, Laws of Florida. The amended provisions, as codified in sections 564.06 and 565.12 Florida Statutes (1985), among other things, grant exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane and certain grape species, all of which will grow in Florida, or from by-products or concentrates

thereof, no matter where the point of manufacture and disallow the tax preference to eligible alcoholic beverages under certain circumstances.

Three separate complaints were filed against the Division of Alcoholic Beverages and Tobacco (DABT) challenging the revised tax preference scheme: one by Tampa Crown Distributors, Inc. and Florida Beverage Corporation, licensed wholesale distributors of alcoholic beverages in Florida, one by McKesson Corporation, also a licensed wholesale distributor and the third by Brown-Forman Corporation, a manufacturer of wine coolers in California who sells its products to wholesalers in Florida for resale in the state. Tampa Crown, Florida Beverage and McKesson challenge the preference and disqualification provisions of both sections 564.06 and 565.12. Brown-Forman challenges only those of section 564.06. The primary claim in all three complaints was that the preference and disqualification provisions under the new tax scheme discriminated in favor of local commerce and against interstate commerce contrary to the mandates of *Bacchus*.

Jacquin-Florida Distilling and Todhunter International, manufacturers who benefit from the challenged preference scheme, intervened as defendants. The DABT raised a number of defenses to each complaint, including a claim that each plaintiff lacked standing to challenge the provisions in question. Tampa Crown/Florida Beverage and Brown-Forman filed motions for summary judgment and supporting affidavits. McKesson filed a motion for partial summary judgment and preliminary injunction. The trial court entered final summary judgments in favor of Tampa Crown/Florida Beverage and Brown-Forman and entered a partial summary judgment and preliminary injunction in favor of McKesson. In all three judgments, the trial judge found:

These amendments were an effort by the legislature to overcome the constitutional problems in the Florida Alcoholic Beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

The rulings were prospective in nature.

The DABT appealed those portions of the judgments finding the tax preference scheme unconstitutional. McKesson and Tampa Crown filed cross-appeals challenging the prospective nature of the rulings and the denial of their claims for a refund. The District Court consolidated the cases and certified the cause to this Court as involving a question of great public importance requiring immediate resolution. We have jurisdiction, article V, section 3(b)(5), Florida Constitutions, and affirm.

First we address the DABT's claim that the appellees lack standing to challenge the "disqualification provisions" because none of them have "alleged or proved any harm to their business flowing from those provisions." Each of the appellees claims that the *overall* tax preference scheme for alcoholic beverages, which is made up of both the exemption provisions and the disqualification provision of sections 564.06 and 565.12, discriminates against interstate commerce and thus, has an adverse competitive impact on their businesses. It is clear, under the *Bacchus* decision, that, as wholesale distributors and manufacturers of alcoholic beverages who are liable for taxes under Florida's alcoholic beverage tax scheme, the appellees have standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact on their businesses. 104 S.Ct. at 3053; *see also Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d. 311, 317 (Fla. 1984). Further, we agree that the appellees clearly have standing to assert their constitutional right to engage in interstate commerce free of burdens violative of the commerce clause. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977); *Mapco Inc. v. Grunder*, 470 F. Supp. 401, 405 (N.D. Ohio 1979).

COMMERCE CLAUSE

We next address the merits of the appellees' challenge under the Commerce Clause of the United States Constitution. The United States Supreme Court employs a two-tiered approach to analyzing state

economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S.Ct. 2080 (1986). This approach was recently explained by the Court in *Brown-Forman* as follows:

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed. 2d 475 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925); *Edgar v. MITE Corp.*, 457 U.S. 624, 640-43, 102 S.Ct. 2629, 2639-41, 73 L.Ed. 2d 269 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d. 174 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. *See Raymond Motor Transportation, Inc., v. Rice*, 434 U.S. 429, 440-441, 98 S.Ct. 787, 793-94, 54 L.Ed.2d. 664 (1978).

106 S.Ct. at 2084-85.

That DABT argues that because any effect which the challenged tax preference scheme might have on interstate commerce is indirect and the tax is applied evenhandedly, the *Pike* balancing approach must be employed in this case. The DABT maintains that under that approach, the trial court erred in finding the challenged tax scheme violative of the Commerce Clause. The appellees, on the other hand, take the position that because the challenged provisions have both the purpose

and effect of discriminating against interstate commerce, they were properly struck down by the trial court as "simple economic protectionism." They argue in the alternative that the preference scheme cannot withstand scrutiny under the *Pike* balancing test. After reviewing the challenged provisions, in light of the record in this case, we agree with the appellees that, even under the *Pike* balancing test, summary judgment was properly entered in their favor.¹

Section 564.06, Florida Statutes (1985) provides in pertinent part:

Excise taxes on wines and beverages; exemptions. -

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of \$2.25 per gallon.

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavorings extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcoholic content is manufactured exclusively from citrus fruits, varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana* or *Vitis berlandieri* (sic), citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates

¹ We find no merit to the DABT's claim that the trial court entered the summary judgments prematurely, thereby failing to allow the Department an adequate discovery period.

thereof, except for flavoring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of \$3 per gallon, except that this tax shall not be required to be paid upon all wines of which the alcohol content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic contents is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts.

...

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

...

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products (sic) used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not be construed as an 'economic incentive or advantage' within the meaning of this subsection.

Section 565.12, Florida Statutes (1985), provides in pertinent part:

Excise tax on liquors and beverages. -

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural produces (sic) used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

The appellees maintain that a review of the legislative history of the tax scheme at issue will "reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism." They argue that the exemption scheme was devised "to protect certain Florida agricultural products, and to protect the manufacturers using those products" at the expense of out-of-state products and the manufacturers using those products and that such a discriminatory purpose requires that the tax preference be found a *per se* violation of the commerce clause under *Bacchus*. Because we find that the tax scheme at issue places a clear discriminatory burden on interstate commerce which the state has failed to justify in terms of legitimate local benefits other than the admitted benefits to local industry flowing from the statute, we need not determine whether the challenged provisions were in fact enacted to serve some underlying protectionist purpose. See *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977).

The DABT bases its position that the tax scheme at issue is evenhanded in its application on the fact that an exemption or

preference is granted based on the classification of crop from which an alcoholic beverage is made rather than upon the in-state origin of the beverage. Affidavits from several experts establish that 1) citrus and sugarcane are grown in Florida as well as in other areas of the United States and the world and 2) the specified grape species are grown throughout the Southeastern United States and the Atlantic States Regions. The DABT acknowledges that "[w]ithout question, [the] provisions [at issue] may affect commerce by increasing the use of sugarcane and citrus in the manufacture of beverages," but maintains that "the effect is not a violation of the Commerce Clause." It contends that no "undue burden on interstate commerce" results from "the fact that some crops used in the interstate production of alcohol may be displaced by other crops grown and sold in the interstate market" or from the fact that there may be "a temporary displacement due to market adjustment." For this proposition, the DABT relies on decisions of the United Supreme Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and the Colorado Supreme Court in *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984). We find the Exxon decision clearly distinguishable from the situation before us and question whether *Exxon* was properly applied by the Colorado Court in *Archer Daniels*.

In *Exxon*, the Supreme Court upheld a Maryland statute prohibiting producers and refiners of petroleum products --all of which were out-of-state businesses-- from retailing gasoline in the state. The statute was enacted in response to perceived inequities in the allocation of petroleum products to retail outlets during the fuel shortage of 1973. In challenging the statute, various oil companies, all of which were engaged in production and refining, as well as in the retail sale of petroleum products, argued that the statute violated the Commerce Clause by discriminating against producers and refiners, all of which were interstate businesses, in favor of independent retailers, most of which were local businesses. In rejecting this contention the Court first found that the statute served the legitimate state purpose of "controlling the gasoline retail market". 437 U.S. at 125. The Court went on to reject claims of discrimination at both the producing-refining and retailing ends of the petroleum industry. The Court concluded that the statute could not discriminate against interstate

petroleum producers and refiners in favor of locally based competition because there were no locally based producers and refiners. The claim of discrimination at the retail level was also rejected because the statute placed "no barriers whatsoever" on competition in local markets by interstate independent dealers. The Court found the situation presented in *Exxon* distinguishable from cases such as *Hunt* and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), in which a state has been found to have discriminated against interstate commerce, because the statute in *Exxon* was found "not [to] prohibit the flow of interstate good, [to] place added costs upon them, or [to] distinguish between in-state and out-of-state companies in the retail market." 437 U.S. at 126. The Court held that neither the "fact that the burden of a state regulation falls on some interstate companies" nor the fact that "an otherwise valid regulation causes some business to shift from one interstate supplier to another" was enough, under the circumstances, to establish a Commerce Clause violation. 437 U.S. at 126-27. However, the Court noted in footnote 16 of the opinion that:

If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market -- as in *Hunt*, 432 U.S., at 347, [97 S.Ct., at 2443] and *Dean Milk*, 340 U.S., at 354, [71 S.Ct. at 297]-- the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods.

437 U.S. at 126 n. 16. The Maryland statute had no effect whatsoever on the interstate flow of goods because, regardless of the status of the ultimate retailer, all the petroleum products sold within the state came from out-of-state.

The DABT also relies heavily on the Colorado Supreme Court's decision in *Archer Daniels*. The *Archer Daniels* court upheld a Colorado statute which provided for a sales tax reduction on gasohol containing at least ten percent alcohol derived from agricultural and

forest products and limited the reduction to gasohol "produced from no more than three million gallons of alcohol annually from each facility having a design production capacity of seventeen million gallons or less per year." 690 P.2d at 180. As originally enacted, the challenged statute limited the tax break so gasohol made from Colorado-produced alcohol. The statute was challenged as violative of both the Commerce and Equal Protection Clauses of the United States Constitution. The Commerce Clause challenge was based on the fact that no Colorado fuel-alcohol producer had facilities which were large enough to be affected by the production capacity limitation; whereas, several out-of-state producers, including the plaintiff, had facilities with a production capacity of more than seventeen million gallons a year. Relying on the *Exxon* decision, the court concluded that the capacity limitations did not have the effect of discriminating against interstate commerce.

In *Exxon*, the lack of a competitive advantage of in-state independent dealers over out-of-state independent dealers and the fact that the Maryland regulation at issue had no effect whatsoever on the interstate flow of goods were critical factors. Along with these factors, it appears that both the *Archer Daniels* court and the appellants, sub judice, have overlooked what the United States Supreme court (sic) has recognized as the "most critical factor in *Exxon*," the absence of discrimination between interstate and local producer-refiners because there were no local producer-refiners to be favored. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980). In contrast, in the instant case, there are clearly manufacturers and distributors of alcoholic beverages made from local products who receive a competitive advantage from the challenged provision. We find this distinction to be crucial and agree with the appellees that the challenged tax preference scheme places a burden on interstate commerce similar to that found to be present in the *Hunt* case.

In *Hunt*, the Washington State Apple Advertising Commission challenged as violative of the Commerce Clause a North Carolina statute which prohibited the display of state grades on closed containers of apples sold or shipped into the state. The Court held this facially neutral law had "the practical effect of not only burdening

interstate sales of Washington apples, but also discriminating against them." 432 U.S. at 350. This conclusion was based on the fact that the challenged statute not only raised the cost of doing business for out-of-state dealers, thus, shielding the local apple industry from the competition of Washington apple growers, but also had the effect of "stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system." 432 at 351. Finding no local benefits flowing from the statute which outweighed the discriminatory burden on interstate commerce and that nondiscriminatory alternatives were available, the *Hunt* Court held that the North Carolina statute violated the commerce clause.

The *Hunt* decision also illustrates that the mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce. See also, *Mapco, Inc. v. Grunder*, 470 F. Supp. 401. In *Hunt*, prior to the challenged statute's enactment, thirteen states shipped apples into North Carolina for sale. Seven of those states, including Washington, had their own grading systems and thus, were disadvantaged by the statute. 432 U.S. at 349. Despite the fact that the six states which did not have a grading system likely benefited from the same "leveling effect which insidiously operate[d] to the advantage of local apple producers," 432 U.S. at 351, the North Carolina statute was found to place a discriminatory burden in interstate commerce.

After considering the probable effect of the challenged tax scheme on both local and interstate commerce, we perceive the same type of discriminatory burden which was recognized in *Hunt*. It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not. It is also undisputed that the beverages targeted for preferential treatment are those manufactured from specified crops, all of which will grow in Florida. It is likewise undisputed that alcoholic beverages made from citrus, sugarcane and the grape species designated in section 564.06 are regarded by consumers as less desirable than alcoholic beverages

manufactured from *vinifera* grapes (which cannot be grown in commercial quantities in Florida) and other agricultural bases. With these facts in mind it becomes quite apparent that, just as the North Carolina statute which was struck down in *Hunt*, Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not made from base crops which are "adapted to growing in Florida". And further, by increasing the cost of beverages made from non-designated crops such as *vinifera* grapes and grains relative to beverages made from the designated preferred crops, the challenged tax preference scheme strips away from manufacturers and distributors of those beverages the competitive and economic advantages which naturally flow from marketing beverages which are considered superior by the public. When such a burden on interstate commerce is demonstrated, "the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. See also, *Minnesota v. Clover Leaf (sic) Creamery Co.*, 449 U.S. 456 (1981).

The DABT and intervenors, Jacquin and Todhunter, contend that even if the challenged tax preference scheme is found to burden interstate commerce, it must be upheld because it was enacted to further Florida's legitimate state interest in promoting the use of important Florida agricultural crops and the beverages made from those crops. As stated by the DABT, the preference provisions further the "legitimate state interest" of "enhancing the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing." The DABT maintains that its position that a state's interest in promoting its own products is "legitimate" for commerce clause purposes is supported by the Supreme Court's recognition that "a state may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271; see also *Boston Stock Exchange*, 429 U.S. 318, 336 (1977) (States may structure their tax systems "to encourage the growth and development of intrastate commerce and industry.")

We agree with appellees that the stated purpose of promoting use of Florida products will not justify a discriminatory burden on interstate commerce such as that present in this case. The appellants' argument that any burden on interstate commerce is outweighed by the state's interest in promoting alcoholic beverages "made from crops which Florida is adapted to growing" is at odds with the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44. As the United States Supreme Court has recently noted in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985):

[I]n *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business.

470 U.S. at 876 n.6. (citations omitted)²

Not only have the appellants failed to show that a legitimate state concern is being served by the challenged provisions, they have also failed to show the stated local interest could not be promoted as well by alternative means which would have "a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Indeed, as pointed out by appellee McKesson, several such alternatives have received express judicial approval under the Commerce Clause. For example, the legislature could have provided property tax relief to Florida manufacturers or growers, as was approved in *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 864 (S.D.N.Y. 1985). Other less discriminatory alternatives include direct cash subsidies, state-sponsored research, or

² We also note that promotion of domestic business or industry, when accomplished by imposing a discriminatory tax against out-of-state competitors, is not a legitimate state purpose under the Equal Protection Clause of the United States Constitution. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985).

state-sponsored promotional campaigns for alcoholic beverages made from Florida crops. *See Id.*

We cannot agree with appellant Jacquin's contention that Florida's alcoholic beverage tax scheme is entitled to "great deference because of the Twenty-first Amendment grant to the individual states of extraordinary powers to regulate alcoholic beverages." As noted in *Bacchus*, 468 U.S. at 276, and recently reiterated in *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 106 S.Ct. at 2087, a state statute is entitled to such defence only when it is determined that the challenged law was enacted to carry out a "purpose of the Twenty-first Amendment." No clear concern of the twenty-first amendment has been shown to be furthered by this tax preference scheme which places an otherwise unjustified and therefore excessive burden on interstate commerce.

We also agree with the appellees that even if the overall preference scheme did not violate the commerce clause by placing an excessive burden on interstate commerce, sections 564.06(9)(a) and 565.12(1)(c)l., (2)(c)1. which deny the tax preference to "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries" can not stand. A state may not enact discriminatory legislation in "response to another State's unreasonable burden on commerce." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958 n.18 (1982); *See also Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986) (State may not enact discriminatory legislation designed to coerce another state into desisting from a Commerce Clause violation). The Commerce Clause itself provides the remedy for discriminatory taxes or requirements placed on out-of-state products. *See Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976).

Because we find the challenged tax preference scheme violative of the Commerce Clause and affirm the summary judgment on that basis, we need not address the other challenges raised by the appellees.

TAX REFUND

We next consider whether the trial court erred in giving its ruling prospective effect and thereby denying cross-appellants McKesson and Tampa Crown a refund. McKesson argues that only a refund of the difference between the disfavored product's tax rate and the favored product's tax rate will cure the constitutional injury which it has suffered. It maintains that because it has paid the discriminatory taxes under protest, pursuant to section 215.26, Florida Statutes (1985), it is entitled to a refund under both state and federal law. Cross-appellant Tampa Crown makes a similar argument. We agree with the DABT that the prospective nature of the rulings below was proper in light of the equitable considerations present in this case. See *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). Not only was the tax preference scheme implemented by the DABT in good faith reliance on a presumptively valid statute, as pointed out by the DABT, if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers.

Accordingly, both those portions of the judgments below finding

[t]hat the provisions of [Florida Statutes] 564.06(2), (3) following the term "\$3.00 per gallon," (4) following the term "3.50 (sic) per gallon," (7) and (9) through (13) and [Florida Statutes] 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are . . . unconstitutional on their face,

and those portions giving the rulings prospective effect are affirmed.

It is so ordered

McDONALD, C.J., AND OVERTON, SHAW, BARKETT,
GRIMES AND KOGAN, J.J.,

Concur

(District certification and list of counsel omitted in printing)

SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 70,368

(Caption omitted in printing)

APPELLEE AND CROSS-APPELLANT
McKESSON CORPORATION'S MOTION FOR REHEARING

Appellee-Cross-Appellant McKesson Corporation ("McKesson"), by and through its undersigned attorneys, pursuant to Florida Rule of Appellate Procedure 9.330, moves for rehearing. McKesson does not wish to reargue the merits of its case but respectfully believes that the Court has overlooked or misapprehended certain [sic] points of law and fact in its peremptory denial of any relief for the constitutional injury McKesson has sustained during the period that Florida has collected discriminatory taxes. McKesson submits that the Court's decision denying relief overlooks both federal law established in similar cases and this Court's own decisions.¹

The Court in denying McKesson's request for an appropriate refund appears to expand the holding in *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973), such that a heretofore-

¹ McKesson will not restate the federal constitutional law arguments that it has already made to this Court. The Court, however, cites *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), in denying McKesson relief. The United States Supreme Court has not in this century permitted a state to collect or retain taxes assessed under an unconstitutional statute. *Lemon* does not hold otherwise. The Court in *Lemon* did not address a taxpayer's claim for relief from a discriminatory tax burden. Rather, the Court allowed payment pursuant to service contracts for services already rendered, even though the Court earlier had declared the contracts unconstitutional. *Lemon* simply cannot be used to authorize Florida to retain taxes that this Court has held were unconstitutionally collected.

recognized narrow exception to the doctrine has swallowed the doctrine.² This Court consistently has provided a refund remedy to taxpayers who paid taxes under an unlawful scheme, although the Court has limited that remedy to those taxpayers who actually filed the suit challenging the validity of the tax scheme.³ In *Gulesian*, however, the Court allowed a carefully-reasoned exception.

In *Gulesian*, the circuit court, after "weighing equities and considering the slight benefits to individual taxpayers [affected by the invalid tax]," denied a refund of taxes collected under an unconstitutional statute. *Gulesian*, 281 So.2d at 326. Specifically, the circuit court found that plaintiffs and all other taxpayers had voluntarily paid the tax "without protest and not under compulsion;" that the School Board, which had levied the invalid tax, had relied in good faith on a presumptively (sic) valid state statute; and that requiring a refund "in small amounts to over 350,000 Dade County taxpayers would impose an intolerable burden on the School Board." *Id.* This Court agreed with the lower court's specific findings and reasoning and, therefore, affirmed.

In this case, however, the circuit court has not made specific findings regarding McKesson's claim for a refund and could not yet weigh the equities because the circuit court has not yet heard evidence on the issue. McKesson in its motions for partial summary judgment and for a preliminary injunction had not yet raised the issue of an appropriate refund. Therefore, when the circuit court decided to bar any relief for the injury McKesson has sustained during the period that Florida has collected the discriminatory taxes, it acted without first

² See *Coe v. Broward County*, 358 So.2d 214, 216 (Fla. 4th DCA 1978) (recognizing *Gulesian* as a narrow exception to the rule that a taxpayer is entitled to a refund of taxes paid pursuant to an unlawful assessment).

³ See *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993, 995 (Fla. 1976); *Osterndorf v. Turner*, 426 So.2d 539, 541, 545 (Fla. 1982); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985).

hearing evidence on the refund issue.⁴ McKesson has not had the opportunity to present its evidence to the lower court establishing the effect of the discriminatory tax burden on McKesson's business in Florida, including the effect on McKesson's sales, market share, and profit. In sum, McKesson has never had the opportunity to demonstrate the extent of the very competitive injury that this Court recognized in striking down the unconstitutional statutes.

Unlike the 350,000 taxpayers in *Gulesian* who were only slightly affected by the improper assessment, McKesson, which did pay the challenged tax under protest and did pay under compulsion, has incurred a substantial injury under a discriminatory scheme. Further, the State in this case did not rely on invalid statutes but rather enacted the unconstitutional statutes.⁵

By applying *Gulesian* in this case to bar any remedy, without first instructing the lower court to hear evidence and weigh the particular equities in this case, the Court appears to expand the narrow holding in *Gulesian* to bar any refund of taxes collected under an unconstitutional statute so long as the statute was presumptively valid before it was declared unconstitutional. McKesson submits that under such a doctrine no taxpayer will ever be entitled to a refund for unconstitutional taxes.

The Court's statement that "the cost of the tax has likely been passed on to their customers" (P. 16) should not serve to bar McKesson's opportunity to present evidence on the measure of its injury. First, the circuit court has not heard evidence on this "pass-on"

⁴ McKesson raised the refund issue in this Court, as a cross-appellant, in response to the lower court's statement that its declaration of unconstitutionality would operate only prospectively, thereby barring any refund.

⁵ McKesson maintains that the State enacted the revised statutes to preserve the protectionism inherent in the former statutory scheme, and acted after the Florida Department of Business Regulation warned in a memorandum that the revised statutes continued the unconstitutional discriminatory effect of the old scheme.

issue. Second, regardless of whether the cost of the discriminatory tax has been passed on to McKesson's customers, McKesson has sustained an economic injury in the competitive marketplace. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the Supreme Court observed: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages."

Whether McKesson raised the price of its products to cover the added tax burden that the discriminatory tax scheme imposed, thereby selling fewer products than it otherwise would have, or did not raise the price of its products to cover the added burden, thereby reducing its profit margin, McKesson has been injured.⁶

Further, this Court plainly found that McKesson has sustained a competitive injury.

It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not [favored].

(P. 12-13)

The Florida alcoholic beverage tax scheme, by design, has imposed an unconstitutional burden on McKesson by raising its cost of doing business compared to distributors of the favored products. That burden continued even after the lower court declared the discrimination unconstitutional because the State's appeal invoked the automatic stay, Fla. R. App. P. 9.310(b)(2), which the lower court declined to lift.

⁶ The alcoholic beverage excise tax is significantly different from the general sales tax, which is stated separately from an item's purchase price and for which retailers simply serve as collection agents for the state. See [212.07(1)(a) and (2), Fla. Stat. (Supp. 1987)

McKesson respectfully urges the Court to determine that McKesson is entitled, under both federal constitutional law and state law, to receive a refund of the difference between what McKesson paid in taxes and what McKesson would have paid if its products had received the same treatment as the favored products. McKesson requests that the Court thereupon remand the case to the lower court to receive evidence to determine the amount of an appropriate refund.

Alternatively, McKesson respectfully requests that the Court remand this case to the lower court with instructions to hear evidence on the issue of McKesson's competitive injury, including evidence on the effect of the discriminatory burden on McKesson's business in

Florida, and then to weigh the particular equities and determine the measure of any relief.

DATED: March 3, 1988.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 70,368

(Caption omitted in printing)

RESPONSE OF DIVISION OF ALCOHOLIC
BEVERAGES & TOBACCO AND OFFICE OF
THE COMPTROLLER TO MOTIONS FOR REHEARING
BY MCKESSON CORPORATON AND TAMPA
CROWN DISTRIBUTORS, INC.

The DIVISION OF ALCOHOLIC BEVERAGES & TOBACCO and THE OFFICE OF THE COMPTROLLER (hereinafter "the State appellants") respond to the motions for rehearing filed by McKesson Corporation and by Tampa Crown Distributors, Inc. and show:

1. The motions contravene *Fla. R. App. P.* 9.330. They are no more than re-argument of the merits of the Court's order. All points and authorities presented by Appellees in the motions were fully briefed by the parties and fully addressed at oral argument. See Answer Brief of McKesson Corp. pp. 57-65; Cross Reply Brief of McKesson, Corp., pp. 9-15; Answer Brief of Tampa Crown Distributors, Inc., pp.49-50; Reply Brief of Tampa Crown Distributors, Inc. pp.1-4; Reply Brief of State appellants, pp. 27-38. The motions are thus clearly inappropriate. *Payne v. Ivey*, 83 Fla. 436, 93 So. 143 (1922); *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d 817 (Fla. 1st DCA 1958); *Whipple v. State*, 431 So.2d 1011 (Fla. 2d DCA 1983).

2. Contrary to the Appellee's assertion that *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973) is a "narrow exception" to an alleged rule requiring taxpayer refunds, this Court has noted that *Gulesian* is not narrowly limited to its facts and, in fact, that its holding is supported by the mainstream of cases which have many times opted for prospective-only relief when a statute, presumed to be constitutional, is declared otherwise. *Deltona Corp. v. Bailey*, 336 So.2d 1163 (Fla. 1976). Indeed this Court affirmed prospective-only relief in *Gulesian* principally because of the school board's reliance on

the presumptive validity of the statute. *Gulesian v. Dade County School Bd.*, *supra*, at 327. See also *Deseret Ranches of Fla., [sic] Inc. v. St. John's River Water Management Dist.*, 406 So.2d 1132, 1142-43 (Fla. 5th DCA 1981) *mod. on other grounds* 421 So.2d 1067 (Fla. 1982). The trial court found the challenged statutory amendments to be "an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision," R. Vol. II, p. 310; Vol. VI, p. 991, thus entitling them to treatment as presumptively valid enactments, and bringing this case within the line of cases which allow for prospective-only relief.

Moreover, the beverage statutes make it clear that wholesale beverage distributors are, functionally, conduits for the collection of the beverage tax from their customers. Section 561.42, Florida Statutes, requires that the distributors' customers make payment for all shipments within ten days. Section 561.50, Florida Statutes, however, does not require remittance of the tax by the distributors to the State until the tenth day of the month following the month of sale. The distributors thus have a "float" period between the collection of charges from their customers and remittance of the tax which ranges between ten and 41 days. Recognizing that fact, the Legislature has provided in § 561.506, Florida Statutes, that the payments made by the distributors are in reality *tax collection* payments and has given the distributors collection allowances quite similar to the collection allowances for sales tax dealers. Compare §§ 564.06(7), 565.13, Fla. Stat (1983) with §212.12, Fla. Stat. (1983). Such is sufficient to bring this case within the rule of *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529, 532 (Fla. 1974). The Appellees are not entitled to a windfall from a retroactive ruling.

3. No evidentiary hearing is required on the alleged effect of the tax on Appellees' market shares or profits. Appellees continue to assert, incorrectly, that they are entitled to a tax refund, not because they bore the financial burden of the tax, but, instead, as a measure of compensation for alleged business injury. The claim that Appellees are entitled to damages for business injury runs afoul of the State's sovereign immunity. The state retains its immunity against damage claims founded upon allegations that a legislative act has caused the injury. See *Trianon Park Condominium Ass'n v. City of Hialeah*, 468

So.2d 912, 918-919 (Fla. 1985). Sovereign immunity bars such a claim, whether straightforward or artfully disguised as a tax refund claim. *Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S.W. 2d 1174, 1177 (1937). Section 215.26, Florida Statutes, allows only refunds of taxes, not payment of compensatory damages.

4. Scores of modern decisions, both state and federal, have opted for decrees without retroactive effect. The courts have done so in cases involving the constitutionality of tax exemptions and tax laws. E.g., *Gulesian v. Dade County School Bd.*, *supra*; *Metropolitan Life Ins. Co. v. Commissioner of Insurance*, 373 N.W. 2d 399 (N.D. 1985). They have even done so in cases involving enforcement of the Civil Rights Act of 1964, the enforcement of which receives special deference. E.g., *City of Los Angeles, Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L. Ed.2d 657 (1978); *Arizona Governing Committee For Tax-Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed. 2d 1236 (1983). The Court's prospective-only declaration in this case is well within the channel of those cases and no federal case on point calls for a contrary result. It is worthy of note that the United States Supreme Court has refused to adopt a rule of decision requiring tax refunds in several recent decisions where the tax laws of various states have been found to contain constitutional defects and has, instead, remanded such cases to the state courts to determine whether the remedy of a tax refund is appropriate or not. *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed. 2d 11 (1985); *Tyler Pipe Industries, Inc. v. Washington Dep't. of Revenue*, 483 U.S. ___, 107 S.Ct. 2829, 97 L.Ed. 2d 2211 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

WHEREFORE, the State appellants request that the Court deny the motions for rehearing by McKesson Corporation and by Tampa Crown Distributors, Inc.

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IN THE SUPREME COURT OF FLORIDA

No. 70,368

(Caption omitted in printing)

JACQUIN-FLORIDA DISTILLING AND
TODHUNDER INTERNATIONAL MOTION
FOR STAY OF THE MANDATE SHOULD
THE PENDING MOTION FOR REHEARING
BE DENIED

Jacquín-Florida Distilling Co., Inc. and Todhunter International, Inc. have filed a Motion for Rehearing which is currently pending before the Court. Should that Motion be denied, Jacquín-Florida and Todhunter respectfully request that the Court stay issuance of its mandate pending the filing of a petition for writ of certiorari to the Supreme Court of the United States and, upon timely filing, stay the mandate until the Supreme Court acts on the petition. The certiorari petition will be filed within thirty days of this Court's order denying rehearing if the mandate is stayed. The promise of prompt filing reflects Jacquín-Florida's and Todhunter's desire to avoid delay and expeditiously resolve the substantial issues presented by this Court's opinion.

The reasons for granting certiorari are substantial. First, this Court's decision presents the unanswered question of whether an alcoholic beverage tax statute which is not tied to local production is invalid. In *Bacchus Imports, Ltd. v. Dias*, ___ U.S. ___, 104 S.Ct. 3049 (1984), the Court wrote:

[T]he effect of the exemption is clearly discriminatory in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced

exemption products and non-exemption products from outside the State, there is a discriminatory effect.

Id., at 3056. In the instant case the beneficial tax rate is available to all manufacturers without regard to their location or the source of the agriculture used to manufacture the beverage. Therefore the petition would present an important question unanswered in *Bacchus*:

MAY A STATE, POST *BACCHUS*, PROVIDE BENEFICIAL TAX RATES TO ALCOHOLIC BEVERAGES MADE FROM SPECIFIED AGRICULTURAL PRODUCTS AS LONG AS THOSE BENEFICIAL RATES ARE AVAILABLE TO ALL MANUFACTURERS AND ARE NOT TIED TO LOCAL PRODUCTION OF THE BEVERAGES, NOR TO LOCAL PRODUCTION OF THE AGRICULTURAL PRODUCTS FROM WHICH THE BEVERAGES ARE MADE?

Second, whether or not the Twenty-first Amendment to the United States Constitution allows a state to enact an evenhanded alcoholic beverage taxing statute is still not completely resolved. Three justices in *Bacchus* would have upheld the Hawaii statute under the authority of the Twenty-first Amendment. *See*, dissent of Justices Stevens, Rehnquist and O'Connor in *Bacchus*, 104 S.Ct. at 3059. Justices White, Burger, Powell, Blackmun and Marshall formed the *Bacchus* majority. (Justice Brennan did not participate in *Bacchus*.) Justices Burger and Powell are no longer on the Court, having been replaced by Justices Scalia and Kennedy. Justice Kennedy's views are unknown. Justice Scalia has taken a dim view of assertive judicial use of the Commerce Clause:

The historical record provides no grounds for reading the Commerce Clause to be other than what it says--an authorization for Congress to regulate commerce.

Tyler Pipe Industries, Inc. v. Washington Department of Revenue, __ U.S. __, 107 S.Ct. 2810, 2828 (1987) (Scalia, J., dissenting in part).

Given that view, Justice Scalia may be a fourth vote for certiorari on the Twenty-first Amendment issue.

Third, this Court's decision specifically rejects the Commerce Clause analysis used by the Colorado Supreme Court in *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984): "We find the *Exxon* decision clearly distinguishable from the situation before us and question whether *Exxon* was properly applied by the Colorado Court in *Archer Daniels*." *Division of Alcoholic Beverages and Tobacco, et al. v. McKesson Corp., et al.*, __ So. 2d __, 13 F.L.W. 120,123 (1988). And the Court's analysis in this case is at odds with *New Energy Co. of Indiana v. Limbach*, 513 N.E.2d 258 (Ohio 1987), probable jurisdiction noted, 108 S.Ct. 500 (1987). Different results from different state supreme courts regarding proper application of constitutional principles is another reason for the Supreme Court to exercise its certiorari jurisdiction. *See*, Rule 17, Rules of the Supreme Court of the United States. The noting of probable jurisdiction in *Limbach* reflects the importance of the issues at stake in those state attempts to walk the Commerce Clause line.

Thus, because the questions are substantial, the reasons for granting certiorari are present, and the application for certiorari will be expeditiously filed, Jacquin-Florida and Todhunter International respectfully request that the Court stay issuance of its mandate pending the filing of a petition for writ of certiorari within 30 days of an order of this court denying rehearing, and, upon proof of such timely filing,

this Court permit the stay of mandate to remain in effect until the Supreme Court of the United States acts upon the petition.

Respectfully submitted,

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By: BRUCE ROGOW

On Behalf of Todhunter
International, Inc. and Jacquin-
Florida Distilling Co., Inc.

(Certificate of Service omitted in printing)

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case No. 70,368

(Caption omitted in printing)

RESPONSE OF DIVISION OF ALCOHOLIC BEVERAGES AND
TOBACCO, DEPARTMENT OF BUSINESS REGULATION AND
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA TO
JACQUIN-FLORIDA DISTILLING'S AND TODHUNTER
INTERNATIONAL'S MOTION FOR STAY OF MANDATE
SHOULD THE PENDING MOTION FOR REHEARING BE
DENIED

The Division of Alcoholic Beverages And Tobacco, Department of Business Regulation and the Office of the Comptroller, State of Florida (hereinafter referred to as "the State appellants") hereby respond to the motion for stay of mandate by Jacquin-Florida Distilling Company, Inc. and Todhunter International, Inc.

The State appellants recognize that the grounds for granting certiorari by the Supreme Court of the United States are substantial. Nevertheless, the State appellants do not support the motion to stay this Court's mandate once the pending motions for rehearing are ruled upon. The State appellants submit that the opinion of this Court ought to operate as the law of this State, pending potential review by the Supreme Court of the United States, in order to avoid uncertainty in

the administration of the beverage excise tax laws of this State and revenue collections pursuant thereto.

Respectfully submitted,

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COUNSEL FOR
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(Certificate of Service omitted in printing)

SUPREME COURT OF FLORIDA
Monday, May 2, 1988

CASE NO. 70,368
Circuit Court Nos. 86-2997, 86-3430 & 86-773
District Court of Appeal,
1st District - Nos. BS-402, BS-304 & BS-404

DIVISION OF ALCOHOLIC BEVERAGES	*
AND TOBACCO, etc., et al.,	*
	*
Appellants/Cross-Appellees,	*
	*
v.	*
	*
McKESSON CORPORATION, et al.,	*
	*
Appellees/Cross-Appellants.	*
	*

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for McKesson Corporation, the Motion for Rehearing filed by attorneys for Tampa Crown Distributors, Inc., and the Motion for Rehearing filed by attorneys for attorneys for Jacquin-Florida Distilling co., Inc. and Todhunter International, Inc., and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied and it is further

ORDERED that the Motion for Stay of the Mandate Should the Pending Motion for Rehearing be Denied filed by attorneys for

Jacquin-Florida Distilling and Todhunter International is hereby denied.

TC

cc Hon. Raymond E. Rhodes, Clerk
Hon. Charles E. Miner, Jr., Judge
Hon. Paul F. hartsfield (sic), Clerk
David G. Robertson, Esquire
Neal S. Berinhout, Esquire
Chris W. Altenbernd, Esquire
Charles A. Wachter, Esquire
M. Stephen Turner, Esquire
Daniel C. Brown, Esquire
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Joseph Klock, Esquire
John K. Aurell, Esquire

MANDATE
SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the Circuit Court in and for Leon County, Florida

WHEREAS, in that certain cause filed in this Court styled:

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, etc., et al.

- vs -

McKESSON CORPORATION, et al.

Case No. 70,368

*Your Case No. 86-2997,
86-3430, 86-773*

The attached opinion was rendered on February 18, 1988

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Parker Lee Mc Donald
Chief Justice of the Supreme Court of Florida and the Seal of said
Court at Tallahassee, the Capital, [sic]
on this 2nd day of May 1988

SUPREME COURT OF THE UNITED STATES

No. 88-192

McKesson Corporation,

Petitioner

v.

Division of Alcoholic Beverages and Tobacco,
Department of Business Regulation of
Florida, et al.

[Respondents]

ORDER ALLOWING CERTIORARI Filed November 14, 1988.

The petition herein for a writ of certiorari to the Supreme Court of Florida is granted. This case is consolidated with No. 88-325, *American Trucking Associations, Inc., et al. v. Maurice Smith, Director, Arkansas Highway and Transportation Department*, and a total of one hour is allotted for oral argument.

November 14, 1988

No. 88-192

Supreme Court, U.S.

FILED

JAN 5 1989

JOSEPH P. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

McKesson Corporation,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

DEPARTMENT OF BUSINESS REGULATION, and

OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

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QUESTION PRESENTED

1. Under what circumstances may a state that enacts a tax that is unconstitutional under the Commerce Clause refuse to grant an injured taxpayer any refund of the collected taxes?

LIST OF PARTIES

The parties to the proceedings below were the petitioner McKesson Corporation ("McKesson"), the respondents Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida (collectively, "the State"), and intervenors Jacquin-Florida Distilling Company, Inc. and Todhunter International, Inc.

The respondents before this Court include the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida.

McKesson's updated Rule 28.1 list is attached to this brief as McKesson Appendix 1a ("M.A." 1a).

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-192

McKESSON CORPORATION,
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Supreme Court of Florida's final decree and opinion is reported at 524 So. 2d 1000 (1988), and is printed at Joint Appendix ("J.A.") 414.

The Florida circuit court's order, which has not been reported, is printed at J.A. 261.

JURISDICTION

The Supreme Court of Florida entered its final decree on February 18, 1988, and denied McKesson's timely motion for rehearing on May 2, 1988. McKesson's motion for rehearing is printed at J.A. 431. The order denying McKesson's motion and the court's mandate are printed at J.A. 448-50.

McKesson invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the United States Constitution's Commerce Clause, U.S. CONST. art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The action also involves sections 564.06 and 565.12, Florida Statutes (1985), and section 215.26, Florida Statutes (1985). The Florida statutory provisions are printed at M.A. 7a-16a, 23a-24a.

STATEMENT OF THE CASE

McKesson in this action seeks a refund of taxes that McKesson paid under unconstitutional Florida tax statutes. The Florida Supreme Court held that the Florida tax statutes violated the Commerce Clause. The Florida court, however, rendered its decision prospective only and refused to permit McKesson to seek any refund of the taxes that McKesson paid under the unconstitutional scheme.

The Florida Products Exemption

Before this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), declaring a Hawaii liquor tax exemption for local products unconstitutional under the Commerce Clause, Florida's alcoholic beverage tax laws granted a tax exemption or reduction to beverages manufactured and bottled in Florida from Florida products ("Florida Products Exemption"). (M.A. 3a-6a) As a Florida court observed, the Florida legislature adopted the Florida Products Exemption "to protect and encourage state industry," *Jacquin-Fla. Distilling Corp. v. Dep't of Business Regulation*, 356 So. 2d 340, 341 (Fla. Dist. Ct. App. 1978), *disapproved on other grounds*, 523 So. 2d 156 (1988). The similarity between the Florida law and the Hawaii law that this Court, in 1984, declared unconstitutional in *Bacchus* prompted the Florida legislature, a year later, to alter the language of the Florida statutes.

The Revised Florida Products Exemption

During the legislative committee hearings to consider changes to the Florida Products Exemption, Florida industry lobbyists pressed the legislature to maintain the protection of local industry. In response, the legislature enacted sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). (M.A. 7a-16a) The legislature removed the word "Florida" from the sections and, instead, substituted language identifying certain agricultural products whose use would entitle the manufacturers and distributors to tax advantages.

The Revised Florida Products Exemption included one section for wines, section 564.06, and one for distilled spirits, section 565.12. The two sections provided a tax exemption for wines and a tax preference for distilled spirits when the alcoholic content of the beverages was manufactured exclusively from certain designated products. The Florida statutes' designated products were all Florida products: citrus, sugarcane, and certain grape species.

Florida, which is one of the few states to produce citrus and is the predominant producer of citrus, designated for preferential treatment citrus fruits, citrus products, and citrus byproducts. (J.A. 72-73) Florida, which is also one of the few states to produce sugarcane and is the leader in the production of sugarcane, designated for preferential treatment sugarcane and sugarcane byproducts. (J.A. 72-74)

Florida, which cannot produce the grape species, *Vitis Vinifera*, that grape producers generally produce for the manufacture of wine and wine coolers, designated for preferential treatment the six grape species that Florida does produce for the manufacture of wine and wine coolers, *Vitis Rotundifolia*, *Vitis Aestivalis ssp. Simpsoni*, *Vitis Aestivalis ssp. Smalliana*, *Vitis Shuttleworthii*, *Vitis Munsoniana*, and *Vitis Berlandieri*. (J.A. 78-80)

The Revised Florida Products Exemption also authorized the Florida Division of Alcoholic Beverages and Tobacco to review the laws and programs of the home state or country of any taxpayer who applied for the tax preferences. If the Division determined that the state or country granted the taxpayer any economic advantage, the Florida law authorized the Division to apply a set of provisions to withhold the Florida tax advantages to the out-of-state taxpayer even if it used the favored products.

The legislative history of the Revised Florida Products Exemption indicates that the Florida legislature intended the new statutory scheme to retain the protectionist character of the former Florida Products Exemption.

One Florida sponsor of the new legislation, Representative Jones, explained the purpose of the Revised Florida Products Exemption to three Florida House of Representatives Committees. On April 23, 1985, before the House Committee on Regulated Industries and Licensing, Mr. Jones stated:

[t]he legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country. . . . I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

(J.A. 84) Representative Hargrid, a co-sponsor of the legislation, testified before the same Committee:

this bill is necessary in order to preserve the home state wine industry that we've begin [sic] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill.

(J.A. 115) During Mr. Jones' testimony before the Appropriations Committee, the Chairman commented that representatives from the grape industry had contacted him. Mr. Jones assured him that the legislation would in fact "take care of them." (J.A. 116) Before the House Committee on Finance and Taxation, Mr. Jones stated:

I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. . . .

With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits.

(J.A. 106-09)

Before the Florida Senate Commerce Committee on May 9, 1985, Senator Crawford, the Senate sponsor, reiterated the same theme:

[f]rankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. . . .

It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State.

(J.A. 120) Before the Florida Senate Finance and Taxation Committee on May 14, 1985, Senator Crawford stated that the bill "maintains the status quo on the current exemption that we have." (J.A. 132)

On the House floor, during the May 28, 1985, debate of the Revised Florida Products Exemption bills, Mr. Jones noted that Florida had "granted a benefit to the distillers in Florida using Florida products for many years." He explained that while the United States Supreme Court's decision in *Bacchus* had disturbed the status quo, the sponsors did not intend to abandon the tax exemption. "We're simply trying to protect what was in place prior to this Supreme Court decision." (J.A. 141-42) During the House floor debates on May 28, 1985, and May 31, 1985, Mr. Jones referred to the legislation as "Florida Products bills." (J.A. 140-51)

The legislative history of the Revised Florida Products Exemption also indicates that the Florida legislators hoped to circumvent the Commerce Clause holding in *Bacchus* by continuing to favor *only* Florida commerce. During the Senate Commerce Committee deliberations, a Florida senator expressed concern that, while encouraging the use of Florida products, the tax exemptions might also encourage the use of out-of-state citrus, grapes, and sugarcane. The Chairman of the Florida Senate Commerce Committee responded that

the Florida statutes, in operation, would favor Florida producers: "[w]e could argue theory but I think reality is much more important." He noted that "the practical effects in reality is [sic] going to accomplish exactly what we want." (J. A. 127-28) Senator McPherson summarized the legislative effort:

[w]hat Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that.

(J.A. 128-29) Immediately before the Senate Committee voted to adopt the bill, the Florida legislators discussed the provisions that allowed Florida to review other states' and countries' laws and programs so that Florida could deny the tax preferences to out-of-state taxpayers who used Florida products. Senator McPherson concluded:

[t]he way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida.

(J.A. 127-30)

Florida's Office of the Governor receives memoranda from Florida's agencies concerning the constitutionality of proposed legislation. The Florida Department of Business Regulation recommended that the Governor veto the Revised Florida Products Exemption. In its memoranda, the Department stated that the revised tax scheme would continue the discriminatory effect of the former Florida Products Exemption. (J.A. 158-65) The Department also warned that the revised discriminatory scheme would leave Florida vulnerable to tax refund actions. (*Id.*)

Florida's Governor allowed the Florida tax scheme to become law without his signature. On July 1, 1985, the Revised Florida Products Exemption, sections 564.06 and 565.12, Florida Statutes (1985), became effective.

McKesson's Action

McKesson has distributed alcoholic beverages at wholesale in Florida and paid substantial excise taxes under sections 564.06 and 565.12, Florida Statutes (1985). (J.A. 261) On September 3, 1986, after the Florida Office of the Comptroller denied McKesson's application for a refund of taxes McKesson paid under the Revised Florida Products Exemption, McKesson filed an action in Florida state court.

McKesson, in its Complaint in the Circuit Court, Second Judicial Circuit, Leon County, challenged the Revised Florida Products Exemption as unconstitutional under the federal and state constitutions. (J.A. 1) In particular, McKesson alleged that the tax scheme discriminated against interstate and foreign commerce in violation of the Commerce Clause and Import-Export Clause, and impermissibly involved Florida in foreign affairs and international relations. McKesson's Complaint prayed that the court declare the Florida statutes unenforceable and also requested a refund of the unconstitutionally collected taxes. (J.A. 10)

In its Complaint, McKesson specifically alleged that it was entitled under Florida's general refund statute, section 215.26, Florida Statutes (1985) (M.A. 23a), to a refund of the discriminatory taxes. (J.A. 7) In its Answer to McKesson's Complaint, the State denied McKesson's allegations of unconstitutionality and challenged McKesson's standing to challenge the statutes and seek a refund. (J.A. 11) The State admitted that McKesson had timely filed a proper application for refund of taxes that it paid pursuant to sections 564.06 and 565.12,

Florida Statutes (1985). (J.A. 14) The State did not raise any defense of sovereign immunity.

One month later, on October 17, 1986, McKesson filed motions for partial summary judgment and for a preliminary injunction. (J.A. 25-80) On November 12 and 26, 1986, Judge Charles E. Miner, Jr. of the circuit court heard arguments. On March 20, 1987, the circuit court entered its order. (J.A. 261) The court found that McKesson had standing to challenge the constitutionality of the tax statutes, noting that McKesson's products compete in the Florida marketplace with the Florida-favored products. (J.A. 263) The court found that the revised statutes -

were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

(J.A. 262-63) The court declared unconstitutional those portions of the statutes that granted tax exemptions or preferences. The court's order included a preliminary injunction that enjoined the State from enforcing the unconstitutional statutory provisions. (J.A. 263)

McKesson in its motion for partial summary judgment had not raised the issue of McKesson's entitlement to a refund of the unconstitutional taxes. Nevertheless, the circuit court proceeded to resolve the issue, stating in its order that its declaration of unconstitutionality would operate only prospectively. (J.A. 263)

On the same day, March 20, 1987, the State filed a Notice of Appeal, which automatically caused a stay of the circuit court's order under Florida Rules of Appellate Procedure 9.310(b)(2). (J.A. 264) McKesson immediately moved the court to vacate the automatic stay, arguing that continued enforcement of the unconstitutional tax scheme

would further expose Florida's revenues to claims for refunds. (J.A. 272-76)

McKesson invited the State to join in the motion to vacate the stay but the State declined. (J.A. 277-90) During the hearing on the motion, counsel suggested that if the court lifted the stay of the injunction, which would cause the Florida firms to pay the same tax rate as the out-of-state firms, the State might agree to escrow the Florida firms' additional payments so they could be more easily refunded if necessary. (J.A. 286) Assistant Attorney General Brown, representing the State, objected, stating that an escrow arrangement would not be necessary or appropriate since Florida law provides for tax refunds. Mr. Brown stated:

[o]n [the escrow proposal], Your Honor, I've got to jump up and scream The State would object to that most strenuously If the Court decides to lift the stay, the practical effect of that will be that beverage distributors around the state, during the interim of the appeal, will pay the full tax rate on all beverages. Those will go into the State Treasury. There is a statutory mechanism in place, Section 215.26, allowing for refunds if we'd be successful on appeal. That administrative process was already created by statute and managed by the Department of Banking and Finance, and I do not wish to see the judiciary interpose itself into the financial management of State Government at this point.

(J.A. 286)

Following Mr. Brown's comments, counsel for McKesson noted also that Florida provides a refund remedy and again urged the court to lift the stay of the injunction to reduce the amount of money that the State would ultimately have to refund:

we feel that we are entitled to a refund of tax monies paid under these unconstitutional statutes, and that right continues

to accrue as long as that statute has the constitutional problems which led this court to throw it out . . . the State has a very strong interest in preserving the integrity of the monies it collects under those statutes

(J.A. 287)

The court denied McKesson's motion to vacate Florida's automatic stay of the court's preliminary injunction against the operation of the Florida tax scheme. (J.A. 291) As a result, Florida continued to collect taxes under the statutes that the court had declared unconstitutional.

In light of the continuing stay, McKesson requested the Florida District Court of Appeal, First District to certify the case to the Florida Supreme Court for immediate review. (J.A. 265) Again, McKesson noted that continued enforcement of the tax scheme exposed Florida's revenues to refund claims. (J.A. 267) McKesson also filed its notice of cross-appeal, challenging the circuit court's decision to restrict its declaration of unconstitutionality and thereby bar retroactive relief. (J.A. 292) On April 13, 1987, the court of appeal certified that the case on appeal was of great public importance requiring immediate resolution by the Florida Supreme Court, and on April 22, 1987, the Florida Supreme Court accepted jurisdiction. (J.A. 294)

In its brief to the Florida Supreme Court, McKesson argued that under both federal constitutional law and Florida law, McKesson is entitled to a refund of taxes it paid pursuant to the unconstitutional tax scheme. (J.A. 323, 367) The State in its brief argued that the circuit court's denial of retroactive relief was proper under federal and state law. (J.A. 374, 393)

On February 18, 1988, the Florida Supreme Court issued its final decree, definitively disposing of all the legal and factual issues in the case. (J.A. 414) In a unanimous opinion, the Florida Supreme Court affirmed the lower court's order declaring unconstitutional those

portions of the Revised Florida Products Exemption that granted tax exemptions or preferences.

First, citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), the Florida Supreme Court found that McKesson has standing "to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact on [its] business[]," and has standing "to assert [its] constitutional right to engage in interstate commerce free of burdens violative of the commerce clause." (J.A. 416)

The Florida Supreme Court held that "the tax scheme at issue places a clear discriminatory burden on interstate commerce . . ." and thereby conferred a competitive advantage on local industry. (J.A. 422) "[T]here are clearly manufacturers and distributors of alcoholic beverages made from local products who receive a competitive advantage from the challenged provisions." (J.A. 425)

The Florida Supreme Court specifically stated that the Florida tax scheme imposed a discriminatory burden similar to what this Court found in *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (J.A. 426-27) Quoting from *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980), the Florida Supreme Court acknowledged "the 'general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.'" (J.A. 428)

The Florida Supreme Court, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), also found that the State had failed to show that "the stated local interest could not be promoted as well by alternative means which would have 'a lesser impact on interstate activities.'" (J.A. 428)

The Florida Supreme Court also held that the provisions in the statutes that withheld the tax advantages, for retaliatory purposes, from out-of-state companies that otherwise might have received the

benefits were also unconstitutional. Citing *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958 n.18 (1982), and *Great Atlantic & Pacific Tea Co. v. Cottrell, Inc.*, 424 U.S. 366, 380 (1976), the Florida Supreme Court stated that "a state may not enact discriminatory legislation in 'response to another State's unreasonable burden on commerce,'" and stated that "[t]he Commerce Clause itself provides the remedy for discriminatory taxes or requirements placed on out-of-state products." (J.A. 429)

Despite the Florida Supreme Court's finding that the challenged tax scheme disadvantaged McKesson in the Florida market (J.A. 416-29), the Florida court refused to permit McKesson to seek any refund of the discriminatory taxes. (J.A. 430) Rather, the court simply affirmed the circuit court's decision to deny any retroactive relief in light of "equitable considerations." (*Id.*) The court declared that the State had implemented the tax preference scheme "in good faith reliance on a presumptively valid statute." (*Id.*) The court also stated, without any evidence in the record, that McKesson, "if given a refund . . . would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." (*Id.*)

On March 3, 1988, McKesson, in a motion for rehearing, asserted that the Florida Supreme Court's peremptory denial of any relief for the constitutional injury McKesson sustained during the period that Florida collected discriminatory taxes overlooks both federal constitutional law and the Florida Supreme Court's own previous decisions. (J.A. 431) McKesson asked the Florida Supreme Court to determine that McKesson is entitled under both federal constitutional law and state law to receive a tax refund.

On May 2, 1988, the Florida Supreme Court denied, without an opinion, McKesson's motion for rehearing and issued its mandate. (J.A. 448-50)

The Revised, Revised Florida Products Exemption

After the Florida Supreme Court declared the Revised Florida Products Exemption unconstitutional, the Florida legislature recognized that Florida's alcoholic beverage tax statutes no longer discriminated against out-of-state commerce and no longer favored Florida products. The Florida Supreme Court's decision in this case had excised the Florida tax statutes' discriminatory provisions so that the statutes imposed the same tax on out-of-state products as on local products. A few months after the Florida Supreme Court's decision, the Florida legislature enacted a new revised tax scheme. (M.A. 17a-22a) The new Florida tax scheme taxes alcoholic beverages produced in Florida at one rate and taxes alcoholic beverages produced out-of-state at another rate, many times higher. (*Id.*)

The original Florida Products Exemption had provided tax advantages for alcoholic beverages "manufactured in Florida from Florida-grown" products. (M.A. 3a-6a) The Revised Florida Products Exemption continued the tax advantages for Florida firms that used specified Florida products. (M.A. 7a-16a) The Revised, Revised Florida Products Exemption provides tax advantages for alcoholic beverages "manufactured within this state [from] produce from land inspected by Florida agricultural inspectors." (M.A. 17a-22a)

Representative Jones, who sponsored the unconstitutional Revised Florida Products Exemption, also sponsored the new revised law. He explained during the House debate that "[o]ur whole-hearted effort here is to protect something that's been in Florida for some 27 years."¹ (M.A. 46a)

¹ The legislative history of the new revised law is not in the record in this case because Florida enacted the new law after the Florida Supreme Court decided this case. McKesson has attached a copy of the legislative history to this brief. (M.A. 25a-84a) This Court, of course, has reviewed statutes' legislative history in numerous Commerce Clause cases. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42 n.8 (1978)

During the House debate, one legislator protested that if a court declared the new law unconstitutional, "the Department of Revenue is going to have to go out and refund money to all these people that we are collecting these dollars from." (M.A. 60a) The legislator continued:

I would read to you as a quote from a court . . . it's from the Florida Supreme Court "When a state statute directly regulates or discriminates against interstate commerce or where its effect is to favor instate economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Without further inquiry is what the Supreme Court said. That's how bad statutes such as this are.

(M.A. 61a)

In response, Representative Simon, a sponsor of the bill, agreed that the dissenting legislator had raised "a real legitimate point" about the "constitutionality of this provision." (M.A. 61a) The sponsor assured the House, however, that if a court held that the new tax scheme violated the Commerce Clause, Florida could still retain the taxes collected under the statutes, without having to refund them. The sponsor referred to the Florida Supreme Court's ruling in this and companion cases:

[w]e have had a number of cases which have stricken down other statutes. When those cases have come up there was not a requirement to refund the money.

(Blackmun, J., concurring in part and dissenting in part); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 325-28 (1977). When reviewing legislative history, the Court has emphasized the statements of sponsors. See, e.g., *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

(M.A. 61a) Representative Simon concluded: "there will not be a loss of even dollar one to the State of Florida." (M.A. 62a)

The Florida Department of Business Regulation provided the Office of the Governor with a memorandum for the new revised tax scheme similar to its earlier memoranda for the old revised tax scheme. The Department again recommended a veto of the discriminatory tax scheme. (M.A. 25a) The Department advised that the new scheme violated the Commerce Clause. (*Id.*)

Florida's Governor again allowed the tax scheme to become effective without his signature. The Revised, Revised Florida Products Exemption became effective July 1, 1988.

In August, 1988, Bacardi Imports, Inc. and N. Goldring Corp., sellers and distributors of alcoholic beverages in Florida, filed an action in the Florida circuit court that, *inter alia*, challenged the constitutionality of the new revised tax scheme under the Commerce Clause. In September and November, Judge Charles E. Miner, Jr. of the circuit court conducted hearings concerning the constitutionality of the tax statutes. On November 29, 1988, Judge Miner, the same judge who declared the Revised Florida Products Exemption unconstitutional, declared the Revised, Revised Florida Products Exemption unconstitutional under the Commerce Clause. (M.A. 85a-93a) The new revised scheme, the court held, was just as unconstitutional as the law that the Florida Supreme Court declared unconstitutional in this case.

[T]here is no question in my mind in a constitutional sense that this statute is but a warmed-over version, dressed up in different clothing perhaps, of that which has previously been, at least on one occasion, struck down as violative of the commerce clause.

(M.A. 88a)

Nevertheless, Judge Miner again made the court's decision prospective only and denied any refund of taxes collected under the unconstitutional statutes. (M.A. 89a-90a)

The State has filed a notice of appeal. (M.A. 94a)

McKesson's Case In This Court

On November 14, 1988, this Court granted McKesson's petition for a writ of certiorari to review the Florida Supreme Court's denial of any retroactive relief from Florida's unconstitutional tax statutes. McKesson in this action seeks a refund for discriminatory taxes that it paid under the Revised Florida Products Exemption. The State did not file any cross-petition asking this Court to review the Florida Supreme Court's decision. Nor has the State otherwise challenged the Florida Supreme Court's decision that the Revised Florida Products Exemption violated the Commerce Clause.

The Court has consolidated this case with *American Trucking Associations, Inc., et al. v. Maurice Smith, Director, etc., et al.*, No. 88-325.

SUMMARY OF THE ARGUMENT

Within this decade, Florida has imposed three successive alcoholic beverage tax schemes that discriminated against interstate commerce. Each tax scheme, authorizing preferential rates on Florida products, has unconstitutionally protected Florida commerce at the expense of interstate commerce.

The Florida Supreme Court, declaring the Revised Florida Products Exemption unconstitutional, acknowledged that the Commerce Clause enforces our national common market. The Florida court followed this Court's numerous decisions that consistently have held that the Commerce Clause prevents one state from protecting its local

commerce by discriminating against the products of other states or nations.

Unfortunately, the Florida court's decision, by denying any retroactive relief from Florida's discrimination, has frustrated Commerce Clause interests. The Florida court refused to grant McKesson, which established the tax statutes' unconstitutionality, any refund of the discriminatory taxes. Further, the court's decision emboldened the Florida legislature to enact yet another discriminatory tax scheme, since Florida's legislators recognized that the Florida courts' declarations of unconstitutionality concerning discriminatory tax statutes did not result in any refunds of taxes. As a result of the successive enactments, the Florida court's decision effectively denied interstate commerce even prospective relief from discrimination. Florida has, in fact, provided a paradigm for a state's protecting local commerce while avoiding any liability for violating the Commerce Clause.

In refusing to grant retroactive relief, the Florida court failed to follow this Court's decisions that have held that a taxpayer's remedy for an unlawful state tax is the recovery of the taxes. This Court has ordered states to return taxes exacted in violation of federal law. For example, the taxpayers in *Maryland v. Louisiana* and in *Iowa-Des Moines Nat'l Bank v. Bennett* received refunds of unlawful taxes.

The Florida court's decision to apply its Commerce Clause holding only prospectively, even though it did not establish a new principle of law, ignored this Court's limitations on a court's power to grant only prospective relief for a violation of federal law. See *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

The State cannot establish, under *Chevron*, that the Florida Supreme Court's decision invalidating the discriminatory Florida statutes should operate only prospectively. The first prong of the *Chevron* standard establishes a threshold test, which ties the standard for prospective relief to its rationale: justifiable reliance on the former

status of the law. The State in this case cannot satisfy the threshold test because it cannot legitimately maintain that the Florida Supreme Court's unanimous decision established a new principle of law. The Florida Supreme Court applied settled Commerce Clause principles that this Court pronounced in cases such as *Hunt* and *Bacchus*.

Even if this Court were to consider the second and third prongs of the *Chevron* standard, McKesson would still be entitled to retroactive relief.

First, the Florida Supreme Court's decision will advance the policies of the Commerce Clause only if it is retroactive. State legislators, who are elected to advance their constituents' interests, understandably respond to pressure to protect local interests at the expense of out-of-state interests. The Florida court's (and other courts') denial of any retroactive relief from protectionist statutes encourages further unconstitutional discrimination against interstate commerce.

Second, this Court's directing Florida to refund the discriminatory portion of the unconstitutional taxes would not be inequitable. Neither of the Florida Supreme Court's two "equitable considerations" for denying relief withstands any scrutiny. The Florida court's first consideration – that Florida implemented the "tax preference scheme" in "good faith reliance on a presumptively valid statute" – simply gives the Florida courts the discretion to decide that no taxpayer may receive retroactive relief in any case under any circumstances. The Florida court's second consideration – that McKesson may not have been injured by the discriminatory tax – contradicts the court's own opinion, in which it recognized that McKesson suffered a significant economic disadvantage as a result of Florida's discrimination. The State's complaint that a tax refund in this case would be inequitable is anomalous in light of Florida's own policy to provide taxpayers refunds of unlawful taxes.

Thus, the Commerce Clause's creation of a national common market and *Chevron's* limitations on prospectivity require the reversal of the Florida Supreme Court's denial of retroactive relief.

ARGUMENT

I. THE FLORIDA SUPREME COURT DID NOT PROTECT THE COMMERCE CLAUSE'S CREATION OF A NATIONAL COMMON MARKET

The Florida Supreme Court acknowledged that the federal Constitution through the Commerce Clause enforces our national interest in free, unrestricted trade among the states through a national common market. (J.A. 414) The Florida court determined that the Florida tax statutes' discrimination against interstate commerce had breached the national common market. Nevertheless, by denying McKesson relief from Florida's discrimination, the Florida court failed to enforce the national interest in free trade.

The Florida Supreme Court understood that "the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. v. Limbach*, ___ U.S. ___, 108 S. Ct. 1803, 1807 (1988). The Florida court cited numerous United States Supreme Court cases establishing the Commerce Clause's role in protecting "the common market created by the Framers of the Constitution." *Great Atlantic & Pacific Tea Co. v. Cottrell, Inc.*, 424 U.S. 366, 380 (1976).

The Florida Supreme Court quoted from *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980), "the 'general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.'" (J.A. 428) A determination that state legislation effects economic protectionism generally requires a finding of unconstitutionality "without further inquiry." *Brown-Forman Distillers v. New York State Liquor Auth.*,

476 U.S. 573, 579 (1986) (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

The Florida Supreme Court determined that Florida had interfered with foreign and domestic commerce through a discriminatory tax scheme that provided a direct commercial advantage to local interests. The Florida court perceived "the same type of discriminatory burden which was recognized" by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (J.A. 426) The Florida court, therefore, applied the constitutional rule of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), that "a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876 n.6 (1985) (discussing *Bacchus*). "We agree with [McKesson]," the unanimous Florida court concluded, "that the stated purpose of promoting use of Florida products will not justify a discriminatory burden on interstate commerce" (J.A. 428)

The Florida Supreme Court's resolution of McKesson's federal constitutional challenge comports with this Court's interpretation of the Commerce Clause. A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880). See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). A state may not "legislate according to its estimate of its own interests [and] the importance of its own products" *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting Story, *The Constitution*, §§ 259, 260).

The Court's solicitude for the Commerce Clause reflects the Court's recognition of the continuing need for review of the innumerable state statutes that threaten the national common market. "[W]hen the centrifugal, isolating or hostile forces of localism are manifested in state legislation, the interests of the union" require judicial intervention. Brown, *The Open Economy: Justice Frankfurter and the*

Position of the Judiciary, 67 Yale L. J. 219, 220 (1957). Justice Holmes remarked:

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

Holmes, *Collected Legal Papers* 291, 295-96 (1921).

Unfortunately, after consideration of McKesson's constitutional claim, the Florida Supreme Court neither corrected Florida's retention of unconstitutional taxes nor discouraged the Florida legislature's enactment of new, unconstitutional statutes.

First, although Florida law permitted McKesson's claim for a refund, the Florida Supreme Court refused to grant McKesson any retroactive relief. The Florida court did not find that McKesson had failed to comply with the Florida statutes that provide taxpayers with a right to a refund for unlawful taxes. Instead, the Florida court, affirming the trial court, decided to make its ruling prospective only.

Second, although the Florida Supreme Court enjoined the enforcement of the Revised Florida Products Exemption, the court's rationale for refusing any retroactive relief effectively denied McKesson any prospective remedy. The Florida legislature quickly decided that Florida, in light of the Florida Supreme Court's ruling in this case, could continue its history of discriminatory taxation without any liability for refunds for the unconstitutional taxes. Thus, in June, 1988, the Florida legislature enacted a new protectionist scheme, the Revised, Revised Florida Products Exemption, that continued to redistribute the burden of Florida's alcoholic beverage taxes to

McKesson and other foreign and domestic firms in interstate commerce.

In essence, Florida has provided a case study of successive discrimination. Several months after this Court's decision in *Bacchus* declared the discriminatory Hawaii tax unconstitutional, the Florida legislature replaced the original discriminatory Florida tax scheme with a revised discriminatory tax scheme. (M.A. 3a-16a) A few months after the Florida Supreme Court declared the revised Florida tax scheme unconstitutional, but rejected any measure of liability, the Florida legislature enacted a new revised discriminatory tax scheme. (M.A. 17a) Florida's original tax scheme, which specifically taxed Florida products at lower rates, imposed significantly greater costs on interstate commerce than on local commerce. Florida's revised tax scheme, which, as the Florida court ruled, also favored Florida products, continued to impose significantly greater costs on interstate commerce than on local commerce. The revised, revised tax scheme, which a Florida court has also declared unconstitutional,² continues the tradition of tax discrimination in favor of local industry.

Florida's legislative and judicial consideration of its unconstitutional tax statutes currently serves as a paradigm for other states interested in protecting local commerce while avoiding any liability for violating the Commerce Clause.³ The Florida Supreme

² Judge Miner of the Florida circuit court, who found the Revised Florida Products Exemption unconstitutional under the Commerce Clause in this case, has already found the Revised, Revised Florida Products Exemption similarly unconstitutional in a new case. Judge Miner concluded that the new statute, "a warmed-over version, dressed up in different clothing," of the previous statute, was unconstitutional under the Commerce Clause. (M.A. 88a) In line with the Florida Supreme Court's decision in this case, Judge Miner made his ruling in the new case prospective only, foreclosing any refunds.

³ Other state courts have also seized upon prospectivity as a means to avoid refunds of unconstitutional state taxes. See, e.g., *American Trucking Ass'n v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), cert. granted, 57 U.S.L.W. 3347 (1988); *Nat'l Can Corp. v. Dep't of Revenue*,

Court's denial of retroactive relief encouraged the legislature to continue to discriminate against interstate commerce. Thus, even after a Florida Supreme Court decision holding the Revised Florida Products Exemption unconstitutional, distributors of out-of-state products still have not secured parity with local competitors. The Florida court's decision in concert with the Florida legislature's enactments has effectively denied McKesson any relief in this case – either retroactive or prospective – for Florida's violation of the Commerce Clause.

II. THE FLORIDA SUPREME COURT FAILED TO FOLLOW THIS COURT'S DECISIONS CONCERNING REMEDIES

The Florida Supreme Court failed to follow this Court's decisions granting appropriate tax refunds as relief to taxpayers from state tax statutes that violated federal law.

This Court, in a long line of cases, has held that taxpayers who successfully challenge state tax statutes on federal grounds are entitled

109 Wash. 2d 878, 749 P.2d 1286 (1988), *cert. denied* and *appeal dismissed*, 108 S. Ct. 2030 (1988); *Penn Mut. Life Ins. Co. v. Dep't of Licensing & Regulation*, 162 Mich. App. 123, 412 N.W.2d 668 (1987), *appeal denied*, 429 Mich. 871 (1987); *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986) *appeal dismissed*, 107 S. Ct. 1949 (1987); *Private Truck Council of Am., Inc. v. Secretary of State*, 54 U.S.L.W. 2372, 503 A.2d 214 (Me. 1986), *cert. denied*, 476 U.S. 1129 (1986); *Metropolitan Life Ins. Co. v. Comm'r of Dep't of Ins.*, 373 N.W.2d 399 (N.D. 1985); *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983), *cert. denied*, 464 U.S. 993 (1983). *But see Westinghouse Electric Corp. v. Tully*, 63 N.Y.2d 191, 470 N.E.2d 853 (1984); *Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984) (ordering an \$18 million tax refund for state tax scheme that violated the Commerce Clause). *Cf. Burlington N. R.R. Co. v. Bd. of Supervisors*, 418 N.W.2d 72 (Iowa 1988) (granting tax refunds for state tax scheme that violated federal statutory law).

to retroactive relief. A taxpayer's remedy for an unlawful state tax statute is the recovery of the taxes.

In *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280 (1912), the Court held that a Colorado tax statute was unconstitutional. Justice Holmes, in the opinion of the Court, observed that since the taxpayer must first pay the challenged tax, the taxpayer should be able to recover any unlawful taxes: "a man who denies the legality of a tax should have a clear and certain remedy." *Id.* at 285. Similarly, in *Ward v. Love County*, 253 U.S. 17 (1920), the Court reversed the state supreme court's denial of a refund of unlawful county taxes:

if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. [citations] To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment. . . .

Id. at 24. The Court in *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), reaffirmed the rule in *Ward* "that a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment."

In *Montana Nat'l Bank of Billings v. Yellowstone County of Mont.*, 276 U.S. 499 (1928), the Court reversed a Montana Supreme Court decision denying a recovery of taxes challenged as discriminatory. The Court stated that the Montana court's repudiation of its prior construction of certain discriminatory state statutes –

does not cure the mischief which had been done under the earlier construction [The taxpayer] cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

Id. at 504-05. The taxpayer was entitled to retroactive relief since prospective relief would not cure the past discrimination.

In *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), the Court reversed the Iowa Supreme Court's refusal to grant taxpayers a refund of unconstitutional taxes. The Iowa court had determined that a discriminatory state tax had unlawfully denied the injured taxpayers equal treatment. The Iowa court, however, held that the taxpayers' remedy was to secure higher taxes from their competitors. Justice Brandeis noted that the state tax violated the federal Constitution and concluded:

a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them.

Id. at 247. See also *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446-47 (1923).

In 1981, the Court affirmed the vitality of the Court's rule that states cannot retain unconstitutional taxes. In *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981), the Court, declaring that a Louisiana tax statute violated the Supremacy Clause and was unconstitutional under the Commerce Clause, ordered the state to "refund to the taxpayers any and all revenues . . . with . . . interest" See also *Dep't of*

Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) (affirming Kentucky Court of Appeals judgment that taxpayer was entitled to refund of tax that violated the Export-Import Clause); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952) (reversing Mississippi Supreme Court's denial of refund of tax that violated Commerce Clause); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940) (reversing North Carolina Supreme Court's denial of refund of tax that violated Commerce Clause).

This Court's decisions, granting refunds to taxpayers successfully challenging state tax statutes, are consistent with the usual rule that judicial decisions operate retroactively. See *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022, 2025 (1987); *United States v. Johnson*, 457 U.S. 537, 542 (1982).

The Florida Supreme Court failed to follow (or even cite) this Court's tax refund decisions before deciding against retroactivity in favor of only prospectivity. The Florida Supreme Court evidently reasoned that its discussion of the doctrine of prospectivity provided a constitutional basis for not applying the federal cases and not permitting a tax refund. In the process of constructing its own doctrine, the Florida court proceeded to ignore this Court's restrictions on the utilization of the doctrine of prospectivity with respect to the resolution of federal issues.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court articulated a standard that limits the consideration of prospectivity to unusual cases that meet three tests. First, a court's decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." *Id.* at 106. Second, the court shall consider whether the retrospective operation of the new legal rule "will further or retard its operation." *Id.* at 106-07. Third, the court shall "weigh[] the inequity imposed by retroactive application" of the new rule. *Id.* at 107.

This Court's later decisions have confirmed that the *Chevron* standard continues to govern the question of retroactivity in civil actions. See *Griffith v. Kentucky*, 479 U.S. 314, 322 n.8 (1987); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982); *United States v. Johnson*, 457 U.S. 537, 563 (1982). See also *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, ___ U.S. ___, 108 S. Ct. 2218, 2222 (1988).⁴

The *Chevron* standard establishes a narrow exception to the historic rule of retroactivity. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022, 2025 (1987). At common law, courts assumed that judicial decisions were to operate retroactively. In 1910, Justice Holmes wrote: "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). See 1 W. Blackstone, Commentaries 69 (15th ed. 1809). Over time, members of the Court have acknowledged that courts do create new law and that parties who justifiably relied upon old law sometimes deserve protection. *Linkletter v. Walker*, 381 U.S. 618 (1965). Courts, however, only utilize the "judicial technique" of prospectivity under exceptional circumstances. See generally Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962). *Chevron*'s three-prong test permits a court to announce a new principle of law but avoid "penalizing" a party that had justifiably relied to its detriment on the preceding principle of law. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982). See also *Lemon v. Kurtzman*, 411 U.S. 192, 206-07 (1973).

⁴ During the last 30 years, the Court has developed an analogous doctrine of prospectivity for criminal cases. See *Griffith v. Kentucky*, 479 U.S. 314 (1987). See generally Note, *Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions*, 1985 U. Ill. L. Rev. 117, 122 (1985).

Chevron places limits on the application of prospectivity because the courts have always placed limits on the latitude for judges to legislate. When a court weighs the merits of applying the law now or applying the law later, the court has adopted the processes of a legislature. "Prospective lawmaking is generally equated with legislation." Mishkin, *The Supreme Court 1964 Term - Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 59-60, 65-66 (1965). See also *Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part).

Chevron acknowledges not only the advantages but also the disadvantages of prospectivity. The power to render a decision only prospective allows a court to acknowledge the societal need for a new rule but minimize the disruptive effect of a clear break with the past. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533 (1977). Unfortunately, the same power that allows change may also encourage change, without sufficient deliberation. "[O]ne of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application." *James v. United States*, 366 U.S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part); *Linkletter v. Walker*, 381 U.S. 618, 644 (1965) (Black, J., dissenting); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 932 (1962).

Further, *Chevron*'s limits on prospectivity serve the Court's interest in institutional stability. Critics of prospectivity have focused on the symbolism that supports the power and prestige of the judiciary. The historical basis for retroactivity - that courts do not make law but rather declare it - underpins the authority of courts to judge the acts of others, particularly the acts of government. A court's undertaking to decide whether to apply law retroactively or just prospectively, therefore, conflicts with the ideal that courts only impersonally apply

the law that they find. See Mishkin, *The Supreme Court 1964 Term – Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 62-70 (1965).

Finally, through its three tests, *Chevron* minimizes the disincentive that prospectivity might interpose for potential challenges to unconstitutional activities. The anticipation that the court, if it accepts a party's legal arguments, will not apply the legal principle to the litigant's own case discourages a party from litigating the issue. A general prospectivity doctrine, therefore, might in some cases inhibit the development of the law. See *Mackey v. United States*, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in part and dissenting in part); Mishkin, *The Supreme Court 1964 Term – Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965). Cf. *Owen v. City of Independence*, 445 U.S. 622, 651 n.33 (1980).

In this case, the Florida Supreme Court improperly ignored the Court's limitations in *Chevron* in its consideration of prospectivity. The states may be free to adopt their own retroactivity-prospectivity doctrine when deciding challenges under state law. The 50 states, nevertheless, are not free to apply 50 different standards when enforcing the federal Constitution. Where a state court holds that the federal Constitution invalidates a state statute, the state court must apply the federal standard to determine how its federal constitutional holding shall operate.⁵ Thus, numerous state courts have recognized that *Chevron* provides the appropriate standard in a federal question

⁵ *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), does not hold otherwise. *Sunburst* did not involve any denial of federal constitutional rights. Rather, the Court considered whether the federal Constitution prevents a state from determining how its own decisions construing its own laws shall operate. The Court held that it does not. "[*Sunburst*] merely holds that the Federal Constitution imposes no barrier to a state court's decision to apply a new state common-law rule prospectively only." *Mackey v. United States*, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in part and dissenting in part).

case and have at least purported to apply the standard. See, e.g., *American Trucking Ass'n v. Gray*, 295 Ark. 43, 746 S.W.2d 377, 378 (1988), *cert. granted*, 57 U.S.L.W. 3347 (1988); *Nat'l Can Corp. v. Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, 1287 (1988), *cert. denied and appeal dismissed*, 108 S. Ct. 2030 (1988); *Exxon Corp. v. Hunt*, 109 N.J. 110, 534 A.2d 1, 8 (1987); *McCann v. Scaduto*, 71 N.Y.2d 164, 519 N.E.2d 309, 314 n.3 (1987); *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026, 1034 (Okla. 1985). Under *Chevron*'s doctrine of prospectivity, a state court may not apply established federal doctrine in a case, but then announce that it does not like the consequences of its holding and, therefore, will fashion its own theory of prospectivity to deny the successful litigant the protection of the law.

As the Court stated in *Chapman v. California*, 386 U.S. 18, 21 (1967), "we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." In *Cohn v. G.D. Searle & Co.*, 784 F.2d 460 (3d Cir. 1986), *cert. denied*, 479 U.S. 883 (1986), the court, exercising diversity jurisdiction, specifically addressed the question of the applicability of the *Chevron* standard. "Where a state statute is held to violate the federal Constitution, the retroactivity *vel non* of that holding is similarly a matter of federal law which we must determine independently." *Id.* at 463.⁶

⁶ The court in *Love v. Johns-Manville Canada, Inc.*, 609 F. Supp. 1457, 1460 (1985), noted that –

it would be somewhat anomalous to countenance a rule which would leave states free to implement or delay implementation of federal constitutional rulings on state law decisional grounds. This is particularly inappropriate when the federal ruling implicates the commerce clause, because that clause is meant to protect against "state action which imposes special or distinct burdens on out-of-state interests unrepresented in the states [sic] political process." [citation omitted].

III. IN LIGHT OF *CHEVRON*, McKESSON IS ENTITLED TO A REFUND OF UNCONSTITUTIONAL TAXES

The State cannot establish, under *Chevron*, that the Florida Supreme Court's decision, invalidating the discriminatory Florida statutes, should operate only prospectively.⁷

A. Since The State Cannot Satisfy *Chevron's* Threshold Test – That The Florida Supreme Court's Decision Established A New Principle Of Law – McKesson Is Entitled To Retroactive Relief

In *Chevron*, this Court emphasized that the first determination for a court resolving the issue of retroactivity or prospectivity is that the decision "must establish a new principle of law."⁸

The Court's reasoning in *Chevron* strongly suggests that unless a decision involves a clear break with previous law, the decision must be applied retroactively. The Court in *Chevron* cites *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968), in which

⁷ Since *Chevron* establishes an exception to the usual rule of retroactivity, the State should bear the burden of showing that retroactivity is not appropriate in this case. See *Cash v. Califano*, 621 F.2d 626, 629 (4th Cir. 1980). Accord *In re Bendectin Litig.*, 857 F.2d 290, 325 (6th Cir. 1988); *Ackinclose v. Palm Beach County*, 845 F.2d 931, 933 (11th Cir. 1988); *Marino v. Bowers*, 657 F.2d 1363, 1375 (3d Cir. 1981) (Weis, J., dissenting); *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1288 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981).

⁸ In *Chevron*, as well as in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1981), the Court found that all three prongs of the test militated in favor of prospectivity and had no occasion to state expressly that the first factor operates as a threshold test.

the Court stressed that unless a court overturns a "clearly declared judicial doctrine" upon which the parties relied "in favor of a new rule," the court has "no reason to confront this theory" of prospectivity. *Hanover Shoe* characterizes a change of law that qualifies for prospectivity as "an abrupt and fundamental shift in doctrine," as "an avulsive change which cause[s] the current of the law thereafter to flow between new banks." *Id.* at 499. *Chevron's* analysis reflects that principle: only after determining that the respondent did not, and could not, foresee that a consistent interpretation of governing law would be overturned, did the Court proceed to address the underlying purpose of the rule and to consider any inequities.

Later Court opinions reinforce the language in *Chevron* that the first prong of the nonretroactivity test operates as a prerequisite for further analysis. In *United States v. Johnson*, resolving a Fourth Amendment issue, the Court noted that –

[i]n the civil context . . . the "clear break" principle has usually been stated as a *threshold test* for determining whether or not a decision should be applied nonretroactively.

457 U.S. 537, 550 n.12 (1982) (emphasis added) (citing *Chevron* and *Hanover Shoe*). Similarly, Justice Stewart, dissenting in *Milton v. Wainwright*, 407 U.S. 371, 381 n.2 (1972), noted that prospectivity is considered only when the Court announces an unforeseeable new rule.

Scholars have interpreted *Chevron* as establishing the first factor in prospectivity analysis as a threshold test. The issue of prospectivity properly arises only when a decision of law constitutes a new, unanticipated rule. "[I]t is fundamental that the rule whose retroactivity is at issue be a newly announced rule." Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. Rev. 745, 763-64 (1983). See also Note, *Prospective Application of Judicial Decisions*, 33 Ala. L. Rev. 463, 482 (1982) The original rationale for

prospectivity – "to ease the burden of an unexpected change of law on people who relied on the old rule" – means that "a court should grant relief *only* when a court has made an 'unexpected change of law.'" Note, *Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prosecutive Decisions*, 1 U. Ill. L. Rev. 117, 137 (1985). See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1620 (1975).

Federal and state courts generally have accepted the logic of Chevron's first prong as a threshold requirement. The federal courts have been "emphatic in demanding novelty as a prerequisite to retroactivity analysis in both civil and criminal matters." Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. Rev. 745, 764 (1983). A majority of the federal Circuits applying Chevron have expressly viewed Chevron's first prong as a threshold test that must be met before the presumption of retroactivity can be overcome.⁹ Most state courts considering prospectivity require a threshold determination that the decision involves a clear break with former law.¹⁰

⁹ See, e.g., *Kremer v. Chemical Construction Corp.*, 623 F.2d 786, 789 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982); *Gluck v. U.S.*, 771 F.2d 750, 756 n.6 (3d Cir. 1985); *EEOC v. Texas Indus.*, 782 F.2d 547, 551 (5th Cir. 1986); *Lund v. Shearson/Lehman/American Express*, 852 F.2d 182, 183 (6th Cir. 1988); *Rakovich v. Wade*, 850 F.2d 1180, 1208 n.20 (7th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3376 (1988); *Wiltshire v. Standard Oil Co.*, 652 F.2d 837, 840 n.2 (9th Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); *Mitchell v. City of Sapulpa*, 857 F.2d 713, 716 (10th Cir. 1988); *Acoff v. Abston*, 762 F.2d 1543, 1548, n.6 (11th Cir. 1985); *I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 425 and n.19 (D.C. Cir. 1987).

¹⁰ See, e.g., *Nat'l Can Corp. v. Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, 1288 (1988), *cert. denied and appeal dismissed*, 108 S. Ct. 2030 (1988); *Exxon Corp. v. Hunt*, 109 N.J. 110, 534 A.2d 1, 8 (1987); *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *McCann v. Scaduto*, 71 N.Y.2d 164, 519 N.E.2d 309, 314 and n.3 (1987); *Poppleton v. Rollins, Inc.*, 735 P.2d 286, 289 (Mont. 1987); *Ryan v. City of Chicago*, 148 Ill. App. 3d 638, 499 N.E.2d 517, 521 (1986), *appeal denied*, 505 N.E.2d 36 (1987); *Mihalcik v. Celotex Corp.*,

In its opinion, the Florida Supreme Court never suggested that its unanimous declaration of the unconstitutionality of the Revised Florida Products Exemption established a new principle of law, either by overruling past precedent or by deciding an issue of first impression. Instead, in finding that the Florida tax scheme violated the federal Constitution, the Florida court simply applied settled Commerce Clause principles that this Court announced in similar cases concerning unconstitutional state statutes. The Florida court certainly did not effect an "avulsive change" in Commerce Clause doctrine. See *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968).

Quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980), the Florida court acknowledged "the 'general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.'" (J.A. 428) Citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), the Florida court found that the Florida tax scheme imposed a discriminatory burden on interstate commerce. (J.A. 422-28) Citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Florida court found that the State had failed to show that "the stated local interest could not be promoted as well by alternative means which would have 'a lesser impact on interstate activities.'" (J.A. 428)

As the Florida Supreme Court noted, the State cited *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), to argue that "a State may enact laws pursuant to its police powers that have the purpose and

354 Pa. Super. 163, 511 A.2d 239, 243 (1986); *Casas v. Thompson*, 42 Cal. 3d 131, 141, 720 P.2d 921 (1986), *cert. denied*, 479 U.S. 1012 (1986); *Federated Mut. Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3, 5 (1986).

effect of encouraging domestic industry." 468 U.S. at 271. The Court in *Bacchus* continued: "[h]owever, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." *Id.* *Bacchus* further informed Florida that " 'in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.' " *Id.* at 272 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 337 (1977)). The Florida court, of course, found such unconstitutional discrimination.

In passing the discriminatory tax scheme, Florida's legislators stated that they intended the tax scheme to strengthen the Florida alcoholic beverage industry, which, they said, needed the tax preference to survive. (J.A. 106, 115) *Bacchus*, however, informed Florida that state taxes may not discriminate against out-of-state products to strengthen domestic commerce. *Id.* at 272-73 (citing *Guy v. Baltimore*, 100 U.S. 434, 443 (1880), and *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

The State cannot legitimately claim that the Florida Supreme Court in this case, which applied settled Commerce Clause doctrine, established a new principle of law. The Florida court found that Florida's discrimination in this case was as unconstitutional as North Carolina's discrimination in *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (J.A. 426-27) As this Court observed in *United States v. Johnson*, 457 U.S. 537, 549 (1982), "when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively."

The State cannot meet *Chevron's* threshold test.

B. If The State Had Satisfied *Chevron's* Threshold Test, The Court's Consideration Of *Chevron's* Remaining Two Tests Would Demonstrate That McKesson Is Entitled To Retroactive Relief

The State cannot establish that the Florida Supreme Court's decision constitutes a fundamental shift in the law that permits a consideration of prospectivity. Only a retroactive decision, permitting McKesson's refund claim for discriminatory taxes, is appropriate. Moreover, if the Florida court had issued a new rule, neither a review of the Commerce Clause's purpose nor a review of the equities would favor only prospectivity.

Commerce Clause Policies

Under *Chevron's* second prong, the Court must consider whether retrospective operation will further or retard the new rule's operation. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). In *Chevron*, the Court found that retroactive application of the new rule for a statute of limitations in *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), would undermine the federal act at issue. *Id.* at 107-8. Similarly, in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1981), the Court found that retroactive application of the new rule would not further its operation. In contrast, the Florida Supreme Court's decision, which does not establish a new rule of law, will further the Commerce Clause's protection of the national common market only if the decision is retroactive.

The Florida court's decision, if retroactive, will further the Commerce Clause by announcing that taxpayers in interstate commerce do have a remedy for unconstitutional discriminations. If Florida may breach the national common market, and keep the unconstitutional taxes, the Commerce Clause would merely express the national interest but not vindicate it. "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must

be attached to their violation." *Hobby v. United States*, 468 U.S. 339, 359-60 (1984) (Marshall, J., dissenting) (footnote and citation omitted). McKesson and other out-of-state taxpayers paid discriminatory taxes so that Florida's tax system could subsidize the development of its local industry. A return of the discriminatory payments will serve the purpose of rectifying the unconstitutional taxation.

The Florida court's decision, if retroactive, will further the Commerce Clause by forcing state legislators (and executives) to recognize that state enactments that unconstitutionally discriminate against interstate commerce will have significant consequences. Cf. *Owen v. City of Independence*, 445 U.S. 622, 651-62 (1980).

State legislators, who are elected to advance their constituents' interests, understandably respond to parochial pressures to protect local interests. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986). As the Florida legislators' comments indicate, state legislators frequently consider the enactment of tax schemes that discriminate against interstate commerce by favoring local interests and disfavoring out-of-state firms. "Each state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states," and states "may also use taxation not to raise revenue but to protect the state's producers or other sellers from the competition of nonresidents." R. Posner, *Economic Analysis of Law* § 26.3 at 602 (3d ed. 1986).¹¹

¹¹ See also J. Choper, *Judicial Review and the National Political Process* 205-06 (1980); J. Ely, *Democracy and Distrust* 83-84 (1980); Smith, *State Discriminations Against Interstate Commerce*, 74 Calif. L. Rev. 1203, 1206-10 (1986); P. Hartman, *Federal Limitations on State and Local Taxation* § 1:3 (1981); Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 Vand. L. Rev. 473, 482-83, 490 (1978).

Presumably, states usually do not intend for their tax legislation to violate the federal Constitution. States, however, do frame their tax statutes to satisfy their own voters. Out-of-state interests generally cannot exert counterbalancing political pressures to defeat protectionism. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940); *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184-85 n.2 (1938). Cf. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978).

[S]tate and local lawmakers are especially susceptible to pressures which may lead them to make decisions harmful to the commercial interests of those who are not constituents of their political subdivisions. That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers is to protect and promote the interests of their own constituents.

L. Tribe, *American Constitutional Law* § 6-5 at 409 (2d ed. 1988). See also *id.* at § 6-1.

A court's interpretation of the federal Constitution may determine whether "the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause" *Nippert v. Richmond*, 327 U.S. 416, 434 (1946). In Florida, the Florida Supreme Court's decision, declaring tax statutes unconstitutional but providing no retroactive relief, did not stimulate the Florida legislature to consider the constitutionality of new tax legislation. The Florida legislative and executive branches certainly were not "at pains" to enact constitutional tax legislation. The Florida legislator who sponsored not only the unconstitutional tax scheme in this case, but also the unconstitutional tax scheme that replaced it,

reassured other legislators that their concerns about the constitutionality of the new statutes were unwarranted:

[w]e have had a number of cases which have stricken down other statutes. When those cases have come up there was not a requirement to refund the money.

(M.A. 61a)

Thus, the Florida court's denial of any retroactive relief had the practical effect of encouraging the Florida legislature to enact protectionist legislation. The Florida court's decision informed the Florida legislature that Florida may retain the unconstitutional taxes that flow from discrimination against interstate commerce. The Florida legislature's response to the Florida court's decision was a third unconstitutional tax on interstate commerce.

This Court's approval of the Florida court's decision would further embolden Florida and other states to ignore the Commerce Clause's proscriptions against unconstitutional tax discrimination. Conversely, judicial disapproval of Florida's use of prospectivity would advance the operation of the Commerce Clause.

Equities

Under *Chevron's* third prong, a court must weigh any inequity that retroactive operation would impose. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971). In *Chevron*, *Lemon*, and *Northern Pipeline*, the Court found that retroactive operation of the new legal rule, which significantly changed the status of the law, would produce substantial inequity *because* one party had justifiably relied on the former legal rule. See *Chevron*, 404 U.S. at 108; *Lemon*, 411 U.S. at 203; *Northern Pipeline*, 458 U.S. at 88. In contrast, the State in this case cannot possibly claim any such justifiable reliance since the Florida Supreme Court's decision did not change the status of the law, and

therefore cannot claim that retroactivity will cause inequity.¹² Nevertheless, the Florida Supreme Court reviewed the State's thorough presentation of "equities" and found two "equitable considerations" to justify its denying any retroactive relief. Neither consideration withstands scrutiny.

First, the Florida court stated that the taxing agency had implemented the "tax preference scheme" in "good faith reliance on a presumptively valid statute." (J.A. 430) Under the Florida court's rewriting of *Chevron's* first prong, the State does not have to show that the Court's decision established a new rule of law, and that the State justifiably relied on the previous rule of law. Instead, the State may simply show that, in implementing the discriminatory tax scheme, the State's taxing authorities relied on the "presumptively valid" Florida statutes that created the discriminatory tax scheme. Of course, all Florida statutes, under Florida law, are presumptively valid until the Florida Supreme Court has held otherwise. See *A.B.A. Indus. Inc. v. Pinellas Park*, 366 So. 2d 761, 763 (Fla. 1979). Therefore, the Florida court's consideration is equivalent to the statement that the Florida courts have discretion to find that taxpayers may not receive retroactive relief in any case under any circumstances. The Florida Supreme Court's approach to the equities would find a basis for prospectivity in every case.

Second, the Florida Supreme Court, in a sentence, proffered an economic analysis of the equities. The court stated that McKesson, if the court were to order a refund, "would in all probability receive a

¹² In *Cash v. Califano*, 621 F.2d 626, 629 (4th Cir. 1980), the court observed that *Chevron's* third prong is closely tied to the first prong. "Absent some surprise engendered by a current judicial interpretation, a litigant cannot be heard to demand nonretroactivity on the basis of inequity." *Id.* at 629.

windfall, since the cost of the tax has likely been passed on to their customers." (J.A. 430)¹³

The Florida court's own opinion refutes its facile economic conclusion about a "windfall." The court stated that the unconstitutional tax scheme "strips away" from McKesson and other interstate competitors their "competitive and economic advantages" in order to benefit local competitors. (J.A. 427) "Florida's alcoholic beverage tax scheme," the court opined, "clearly raises the relative cost of doing business" for McKesson and others. (*Id.*)

The Florida Supreme Court recognized that McKesson's and many other interstate distributors' highly-taxed products directly competed with lightly-taxed Florida products. Florida consumers were free to buy McKesson's alcoholic beverages, other distributors' local beverages, or non-alcoholic alternatives. In the face of competition, McKesson could not raise its Florida prices to cover all its Florida taxes *and* retain its original market share. Either McKesson could absorb all or most of the taxes and attempt to retain its original market share, or McKesson could increase its price to cover all or most of the taxes and lose some of its original market share. Under either economic scenario, McKesson suffered a significant economic disadvantage.

Florida's legislators understood the economics of the unconstitutional tax. They realized that the statutes would benefit Florida businesses at the expense of their interstate competitors (J.A. 84, 106-09), and they passed the protectionist tax scheme in order to

¹³ The Florida Supreme Court purported to resolve the economics of Florida's taxes even though McKesson (and all other parties) had never addressed the issue. In connection with its motions in the trial court for a preliminary injunction and partial summary judgment, McKesson had not requested the court to determine the amount of a refund. The trial court, after ruling that the Florida tax scheme was unconstitutional, simply had declared that its ruling would operate only prospectively. (J.A. 263)

reallocate Floridians' demand among interstate and local products. (J.A. 84, 106-09, 120) McKesson and other interstate competitors would lose, and local firms would gain, revenues and jobs. (J.A. 106-09, 120, 127-30).

The Florida court failed to consider the limitations of the judicial process in the review of economic issues. The court's pronouncement of a potential windfall fails to confront – even in general terms – the intricate economics of tax incidence:

[i]n the end, economic [tax] incidence will depend on how the economy responds. This response depends on conditions of demand and supply, the structure of markets, and the time period allowed for adjustments to occur. Adjustments to a tax will cause factor and product prices to change, and these changes will affect [sellers and buyers], thus determining the burden distribution among them.

R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 268-69 (4th ed. 1984). The Florida court did not attempt to apply tax incidence theory¹⁴ to determine whether McKesson could transfer the burden of the discriminatory tax to its customers. *Compare Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267-68 n.7 (1984).

This Court's decisions concerning the economics of "passing-on" in antitrust cases are instructive. The Court in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 491-94 (1968), had to reconcile the national interest in effective enforcement of federal antitrust laws with an antitrust violator's interest in disproving a victim's economic harm. The Court refused to permit a monopolist to introduce evidence that its customer did not suffer an actual economic

¹⁴ See generally W. Hellerstein, *State and Local Taxation of Natural Resources in the Federal System: Legal, Economic and Political Perspectives* ch. 4 (1986); D. Phares, *Who Pays State and Local Taxes* 29-58 (1980).

injury, finding that a demonstration of the economics of "passing-on" requires a showing of "virtually unascertainable figures." *Id.* at 493. To burden antitrust proceedings with that normally "insurmountable task" would make antitrust actions "long and complicated proceedings involving massive evidence and complicated theories." *Id.* Few injured parties, of course, would litigate. The Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1972), noted:

[t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world rather than an economist's hypothetical model," 392 U.S. at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom. [Footnote omitted]

This Court's analysis in *Hanover Shoe* provides an appropriate model for the analysis in this case. The Court's protection of the Commerce Clause, of course, is as important as the vindication of the antitrust laws. Taxpayers who suffer an unconstitutional tax should not bear the burden of convincing state courts that the complicated theories of tax incidence compel a refund of unconstitutional taxes. Few taxpayers can afford to finance Commerce Clause challenges to unconstitutional state tax statutes. Even fewer taxpayers will volunteer to litigate the issues if economic demonstrations of tax incidence must precede any recovery. The State has the burden of showing that retroactivity is not appropriate for this case. The Court should not permit Florida to condition McKesson's right to a refund upon a proof of the economics of the taxes.

In essence, the Florida Supreme Court's analysis of Florida's "presumptively valid statutes" and McKesson's "windfall" rests upon an unusual view about the equities. The Florida court's opinion presumes that the State's extracting unconstitutional taxes through discriminatory statutes might be equitable, but that the court's

correcting the constitutional injury through a refund of the discriminatory portion of the taxes might be inequitable.

Neither Florida's tax refund statutes nor previous Florida court opinions supports that view of the equities.

McKesson filed this action in the Florida courts because Florida law acknowledges the State's general obligation to return unlawful taxes.¹⁵ Florida's general tax refund statute, section 215.26, Florida Statutes (1985), under which McKesson has sought its tax refund in this case, represents Florida's policy to waive sovereign immunity and permit refund actions against the State. "There have been many suits in Florida to determine the validity of a tax and to direct the making of a refund by the Comptroller under F.S. Section 215.26, F.S.A." *State ex rel. Victor Chemical Works v. Gay*, 74 So.

¹⁵ Under the Tax Injunction Act, 28 U.S.C. § 1341, McKesson could not invoke federal district court jurisdiction since Florida refund procedures appeared to be available. *See California v. Grace Brethren Church*, 457 U.S. 393, 412-17 (1982); *Tully v. Griffin, Inc.*, 429 U.S. 68, 73-77 (1976); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298-301 (1943). However, if Florida is permitted effectively to foreclose any opportunity for taxpayers, who challenge a tax scheme but continue to pay the taxes, to recover the taxes once the taxes are found unconstitutional, the Tax Injunction Act should no longer bar taxpayers from seeking federal injunctive relief. The Court in a divided opinion has held that a state remedy that allows tax refunds but does not allow recovery of interest on the refunds is sufficient to bar jurisdiction. *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503 (1981). The Court, however, has not held that a remedy that does not allow any recovery at all is sufficient. Indeed, the Court permitted federal jurisdiction in *Hillsborough v. Cromwell*, 326 U.S. 620 (1946), because the state remedy did not clearly afford full protection of federal rights. *Id.* at 625-26. *Cf. American Trucking Association, Inc. v. Gray*, ___ U.S. ___, 108 S. Ct. 2 (Blackmun, Circuit Justice 1987) (granting application for injunction; stating that Arkansas' denial of recovery of unconstitutional taxes would constitute irreparable injury). Therefore, the State's peremptory denial of any retroactive relief may cause taxpayers to seek federal court relief, which ultimately may prove more intrusive than properly granting refunds in particular cases. *See Note, The Tax Injunction Act and Suits for Monetary Relief*, 46 U. Chi. L. Rev. 736, 743 (1979).

2d 560, 564 (Fla. 1954). See also *Reynolds Fasteners, Inc. v. Wright*, 197 So. 2d 295, 297 (Fla. 1967); *State ex rel. C.P.O. Mess (Open) v. Green*, 174 So. 2d 546, 550-51 (Fla. 1965). McKesson, as the payer of the taxes, is the party who is entitled to a refund. (M.A. 23a)

Indeed, before the Florida Supreme Court constructed its doctrine of prospectivity in this case, the court had been particularly solicitous of taxpayers' rights to recover invalid taxes. For example, in *State ex rel. Palmer-Florida Corp. v. Green*, 88 So. 2d 493, 495 (Fla. 1956), the Florida Supreme Court, ordering a tax refund, stated that "[i]n this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover" the taxes. As another example, in *Walgreen Drug Stores Co. v. Lee*, 158 Fla. 260, 28 So. 2d 535, 536 (1946), the Florida court noted the "well-settled rule" that tax statutes, if susceptible of two meanings, should be construed in a manner most favorable to the taxpayer. See also *Overstreet v. Ty-Tan, Inc.*, 48 So. 2d 158, 160 (Fla. 1950). The Florida court generally has held that at least the taxpayers who actually challenged the statutes were entitled to the statutory tax refunds. See, e.g., *Osterndorf v. Turner*, 426 So. 2d 539 (Fla. 1982).¹⁶

¹⁶ The Florida Supreme Court has made certain decisions concerning tax statutes prospective only. In almost all cases, the taxpayers who actually challenged the statutes were entitled to the statutory tax refunds. See *Colding v. Herzog*, 467 So. 2d 980, 983 (Fla. 1985); *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 580 (Fla. 1984); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993, 995 (Fla. 1976); *City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 7 (Fla. 1972). In *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973), the Florida court approved the denial of refunds where all 350,000 taxpayers had paid the tax without protest and the refund for each taxpayer would have been slight. See *Coe v. Broward County*, 358 So. 2d 214, 216 (Fla. Dist. Ct. App. 1978) (construing *Gulesian* "to have carved out a very narrow exception to the taxpayer's right to a refund," and reversing trial court's denial of \$3,800,000 in tax refunds).

Florida historically has recognized the obvious equity of refunding unlawful taxes to taxpayers. As Justice Cardozo noted, a government should have no interest in retaining taxes that it has unlawfully collected. *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378-79 (1933). Thus, the State's argument that a tax refund in this case would be inequitable is anomalous.¹⁷

Florida may not continue to use the Florida legislature's tax policies and its supreme court's prospectivity doctrine to frustrate the Constitution's interest in a national common market. McKesson and other out-of-state firms may not avoid their obligation to pay constitutional taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977). Similarly, Florida may not avoid its obligation to return to McKesson unconstitutional taxes.

¹⁷ As the Court recognized in *Ward v. Love County*, 253 U.S. 17, 24 (1920), the equitable policy underlying the Takings Clause of the Fifth Amendment provides an analogy:

[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law.

Recently, in *Nollan v. California Coastal Commission*, ___ U.S. ___, 107 S. Ct. 3141, 3147 n.4 (1987), the Court stated that the Takings Clause precludes forcing a few property owners to bear the burdens that, in fairness, the public should bear. By comparison, the State in this case, in rejecting any claim for retroactive relief, compels McKesson and other sellers of interstate goods to bear the total burden of Florida's unconstitutional actions.

CONCLUSION

McKesson respectfully prays that this Court reverse the Florida Supreme Court's final decree only with respect to its declaration of prospectivity and direct the court to order a tax refund to McKesson of the statutory difference between what McKesson paid in taxes under the unconstitutional Revised Florida Products Exemption and what McKesson would have paid in taxes under the Revised Florida Products Exemption's rates for the favored products.

Dated: January 6, 1989

Respectfully submitted,

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Petitioner McKesson Corporation's Revised
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries)
and Affiliates

Armor All Products Corporation

Armor All Products of Canada, Inc.

Armor All Products GmbH

APC Chemicals, Inc.

City Properties, S.A.

Comercial Farmaceutica Interamericana, S.A.

Comercial Interamericana, S.A. (Dom. Rep.)

Comercial Interamericana, S.A. (El Salvador)

Comercial Interamericana, S.A. (Guatemala)

Computer Aided Systems, Inc.

Corporacion Bonima, S.A.

Corporacion Interamericana, S.A.

Distribuidora Farmaceutica Calox Colombiana, S.A.

Intercal, Inc.

Investigaciones Farmoquimicas De Colombia, S.A.

Laboratorios Calox, C.A.

Medilog Corporation

Medilog GmbH

Mount Gay Distilleries Limited

Organizacion Farmaceutica Americana, S.A.

PCS, Inc.

PCS of New York, Inc.

PCS Services, Inc.

Pharmaceutical Card System Canada, Inc.

Pharmaceutical Data Services, Inc.

SDC Distributing Corp.

CHAPTER 564 WINE

564.06 Excise taxes on wines and beverages; exemptions.

564.06 Excise taxes on wines and beverages; exemptions.—

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of \$2.25 per gallon.

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, manufactured in Florida from Florida-grown fresh fruits, berries, or grapes and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in Florida and bottled in Florida, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight manufactured and bottled in Florida from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of \$3 per gallon, except that this tax shall not be required to be paid upon all wines manufactured in Florida from fresh fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state, bottled within this state, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines manufactured in Florida from fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state and bottled within this state.

(5) As to all beverages taxed under this section which are manufactured or bottled in Florida, there shall be a 2-percent discount allowed to the manufacturer or bottler on the amount of taxes assessed against wine for his losses from shrinkage, in filtering, breakage, and waste in bottling, the 2 percent to be computed on the taxable amount assessed by the state when sold taxpaid; and the 2 percent shall be deducted by the manufacturer or bottler on his monthly report.

(6) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(7) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted with the tax is delinquent at the time of payment.

(8) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(9) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

CHAPTER 565 LIQUOR

565.12 Excise tax on liquors and beverages.—

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$6.50 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.15 per gallon.

(2)(a) As to beverages containing more than 48 percent alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$9.53 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.75 per gallon.

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post

exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

BEVERAGE LAW: ADMINISTRATION

564.06 Excise taxes on wines and beverages; exemption.-

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of \$2.25 per gallon

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits, varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates thereof, except for flavoring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of \$3 per gallon except that this tax shall not be required to be paid upon all wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis* ssp. *simpsoni*, *Vitis aestivalis* ssp. *smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts., and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$3.50 per gallon except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia*, *Vitis aestivalis ssp. simpsoni*, *Vitis aestivalis ssp. smalliana*, *Vitis shuttleworthii*, *Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts.

(5) Wine used by an established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(8) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not be construed as an "economic incentive or advantage" within the meaning of this subsection.

(10)(a) For the months of July and August each year the tax rate for the products specific in subsection (2), except for wine coolers which are defined below in paragraph (b), shall be \$2.25 per gallon. Otherwise, the tax rate for these products, except wine coolers, will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of the products specified in subsection (2).

Total gallons sold in the month prior to the time of calculation	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 10,000.....	0.00
10,001 - 20,000	0.35
20,001 - 30,000.....	0.55

10a

30,000 - 40,000.....	0.75
40,001 - 50,000.....	0.95
50,001 - 60,000.....	1.15
60,001 - 70,000.....	1.25
70,001 - 80,000.....	1.45
80,001 - 90,000.....	1.65
90,001 - 100,000.....	1.85
100,001 - 110,000.....	2.05
Above 110,000.....	2.25

(b) For the months of July and August 1985, 40 cents per gallon will be the tax for wine coolers; a combination of wine, as described in subsection (2); carbonated water, and flavors of fruit juices and preservatives containing 1 to 6 percent alcohol content by volume. Thereafter, the tax rate for wine coolers will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of wine coolers.

2. The total of sales referred to in subparagraph 1, of this paragraphs shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of March, April, May, June, July, and August	The new per gallon tax rate for all gallons sold in the month following the time of calculation
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0 - 250,000.....	0.40
250,001 - 275,000.....	0.65
275,001 - 300,000.....	0.90
300,001 - 325,000.....	1.15

11a

325,001 - 350,000.....	1.40
350,001 - 375,000.....	1.65
375,001 - 400,000.....	1.90
Above 400,000.....	2.25

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of September, October, November, December, January, and February

The new per gallon tax rate for all gallons sold in the month following the time of calculation

0 - 100,000.....	0.40
100,001 - 125,000.....	0.65
125,001 - 150,000.....	0.90
150,001 - 175,000.....	1.15
175,001 - 200,000.....	1.40
200,001 - 225,000.....	1.65
225,001 - 250,000.....	1.90
250,001 - 275,000.....	2.15
Above 275,000.....	2.25

(c) For the months of July and August each year, the tax rate for products specified in subsection (3) shall be \$3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph, shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in
the month prior to the
time of calculation
the time of calculation

The new per gallon tax
rate for all gallons sold
in the month following

0 - 12,500.....	1.50
Above 12,500	3.00

(c) For the months of July and August each year, the tax rate for products specified in subsection (4) shall be \$3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in
the month prior to the
time of calculation
the time of calculation

The new per gallon tax
rate for all gallons sold
in the month following

0 - 2,000	1.50
20,001 - 4,000	2.00
4,001 - 6,000.....	2.50
6,001 - 8,000.....	3.00
Above 8,000.....	3.50

(e) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax

rates applicable for the following month based on preceding paragraphs (10)(a), (b), (c), and (d).

(11) Any new applicant for the tax exemptions provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d), shall apply for those rates between July 1 and July 31 of each year, and shall pay an annual nonrefundable application fee of \$3,000. The division shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(12) Each manufacturer authorized to do business under the tax exemption provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d), shall pay an annual license fee of \$1,000 plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax exemptions or rates set forth in subsection (2), subsection (3), or subsection (4), or paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d).

(13) All revenue collected pursuant to subsections (11) and (12) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

565.12 Excise tax on liquors and beverages.-

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts,

the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of \$9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of \$4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or

alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(5) For the months of July and August every year the tax rate for products specified in paragraph 9(1)(b) will be \$6.50 per gallon and the tax rate for the products specified in (2)(b) will be \$9.53 per gallon. Thereafter the tax rate for the products in paragraph (1)(b) and in paragraph (2)(b) will be determined in paragraph (6).

(6) By the 20th of each month (hereinafter, the time of calculation) commencing August 20, 1985, the Department of Business Regulation shall determine the increase or decrease in the sale of alcoholic beverage gallonage taxed at the rates provided in paragraph (1)(b) or paragraph (2)(b) for the prior month in comparison to that month of the year before. If that gallonage has increased, the percentage amount of said increase in excess of 5

percent shall be the percentage increase in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following the "time of calculation." If the gallonage has decreased, the percentage amount of said decrease in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following "the time of calculation." However, the tax rate provided in paragraph (1)(b) shall not decrease below \$4.35 per gallon or increase above \$6.50 per gallon, and the tax rate provided in paragraph (2)(b) shall not decrease below \$4.95 per gallon or increase above \$9.53 per gallon.

(7) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month based on subsection (6).

(8) All revenue collected pursuant to subsections (9) and (10) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

(9) Any manufacturer or importer applying for the tax rate provided in paragraph (1)(b) or paragraph (2)(b) shall apply for that rate between July 1 and July 31 of each year and shall pay a nonrefundable application fee of \$5,000. The department shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(10) Each manufacturer authorized to do business under the tax rates imposed under paragraph (1)(b) or paragraph (2)(b) shall pay an annual license fee of \$3,000, plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax rates provided in paragraphs (1)(b) and (2)(b).

FLORIDA SENATE BILL S.B. 1326
(Enrolled as Chapter 88-308 on July 7, 1988)

* * * *

Section 9. Effective July 1, 1988, the Legislature finds and determines that the authorized transportation and importation into the state of alcoholic beverages described in chapters 564 and 565, Florida Statutes, require strict enforcement of state statutes regulating and administering the manufacture, distribution and sale of alcoholic beverages; the costs of regulating and administering such imported alcoholic beverages are greater than for those alcoholic beverages not imported; the production of lower quality alcoholic beverages should be discouraged; and in order to protect the health, safety, welfare and economic integrity of the state, the costs of ensuring compliance with relevant state laws should be included in the taxes imposed upon said alcoholic beverages.

Section 10. (1) Effective July 1, 1988, section 564.06, Florida Statutes, is amended to read:

564.06 Excise and import taxes on wines and beverages.—

(1)(a) As to beverages including wines, except natural sparkling wines and malt beverages, containing 0.5 percent or more alcohol by volume and less than 17.259 percent alcohol by volume, there shall be paid by all manufacturers and distributors a tax at the rate of \$.25 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of all beverages including wines, except natural sparkling wines and malt beverages, containing 9.5 percent or more alcohol by volume and less than 17.259 percent alcohol by volume, an import tax in the amount of \$2.00 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(2)(a) As to all wines, except natural sparkling wines, containing 17.259 percent or more alcohol by volume, there shall be paid by manufacturers and distributors a tax at the rate of \$.50 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of all wines, except natural sparkling wines, containing 17.259 percent or more alcohol by volume, an import tax in the amount of \$2.50 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(3)(a) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of \$1.50 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of natural sparkling wines an import tax in the amount of \$2.00 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(4)(a) As to wine coolers, which are a combination of wines containing 0.5 percent or more alcohol by volume, carbonated water, and flavors or fruit juices and preservatives and which contain 1 to 6 percent alcohol content by volume, there shall be paid

by all manufacturers and distributors a tax at the rate of \$.75 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of wine coolers as described in paragraph (a) an import tax in the amount of \$1.50 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(5) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) All beverages taxed under paragraphs (1)(a), (2)(a), (3)(a), or (4)(a) and manufactured within this state for sale in this state, if fortified, shall be fortified with alcohol, except for flavoring extracts, distilled above 185 proof from produce of agricultural land inspected by Florida agricultural inspectors. All wines taxed under paragraphs (1)(a), (2)(a), (3)(a) or (4)(a) and manufactured within this state for sale in the state shall be made of produce from land inspected by Florida agricultural inspectors.

(8) The excise and import taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The department is authorized to promulgate rules to effectuate the provisions of this section.

(2) It is the legislative intent that if any amendatory provision of this section is held invalid by an interlocutory decree, while in effect, or final decree or order of a court of competent jurisdiction, the provisions of s. 564.06, Florida Statutes, as it existed on the day prior to the effective date of this section, shall then be revived and shall be the law of this state, except as to such provisions of s. 564.06, Florida Statutes, which have heretofore been held unconstitutional by the Florida Supreme Court, and except that any amendments to such section enacted other than by this section shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of said section which expire pursuant to the provisions of this section.

Section 11. (1) Effective July 1, 1988, section 565.12, Florida Statutes, is amended to read:

565.12 Excise and import tax on liquors and beverages.—

(1)(a) As to beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, except wines, there shall be paid by every manufacturer and distributor a tax at the rate of \$4.75 per gallon. As to beverages containing less than 17.259 percent of alcohol by volume, there shall be paid by every manufacturer and distributor a tax at the rate provided in chapter 564.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, an import tax in the amount of \$1.75 per gallon to be paid by every manufacturer and distributor.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(2)(a) As to beverages containing more than 55.780 percent of alcohol by volume, there shall be paid by every manufacturer and distributor a tax at the rate of \$5.95 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of beverages containing more than 55.780 percent of alcohol by volume, an import tax in the amount of \$3.58 per gallon to be paid by every manufacturer and distributor.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(3) The excise and import taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(4) All beverages distilled in this state for sale in this state shall be distilled above 185 proof, except for flavoring extracts, of produce from land inspected by Florida agricultural inspectors.

(5) The department is authorized to promulgate rules to effectuate the provisions of this section.

(2) It is the legislative intent that if any amendatory provision of this section is held invalid by an interlocutory decree, while in effect, or final decree or order of a court of competent jurisdiction, the provisions of s. 565.12, Florida Statutes, as it existed on the day prior to the effective date of this section, shall then be revived and shall be the law of this state, except as to such provisions of s.

565.12, Florida Statutes, which have heretofore been held unconstitutional by the Florida Supreme Court, and except that any amendments to such section enacted other than by this section shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of said section which expire pursuant to the provisions of this section.

Section 12. In the event that a court of competent jurisdiction determines any of the provisions of s. 564.06 or s. 565.12 as amended by this act to be unconstitutional, it is the intent of the legislature that the amendments to s. 564.06 and s. 565.12 contained in this act shall be null and void and that those sections revert to the language existing in said sections on June 30, 1988.

* * * *

§215.26 Repayment of funds paid into state treasury through error, etc.

(1) The comptroller of the state may refund to the person who paid same, or his heirs, personal representatives or assigns, any moneys paid into the state treasury which constitute:

- (a) An overpayment of any tax, license or account due;
- (b) A payment where no tax, license or account is due; and
- (c) Any payment made into the state treasury in error;

and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to time such sums as may be necessary for such refunds.

(2) Application for refunds as provided by this section shall be filed with the Comptroller, except as otherwise provided herein, within 3 years after the right to such refund shall have accrued else such right shall be barred. The Comptroller may delegate the authority to accept an application for refund to any state agency vested by law with the responsibility for the collection of any tax, license, or account due. Such application for refund shall be on a form approved by the Comptroller and shall be supplemented with such additional proof as the Comptroller deems necessary to establish such claim; provided, such claim is not otherwise barred under the laws of this state. Upon receipt of an application for refund, the state agency to which the funds were paid shall make a determination of the amount due. If an application for refund is denied, in whole or in part, such state agency shall so notify the applicant stating the reasons therefor. Upon approval of an application for refund, such state agency shall furnish the Comptroller with a properly executed voucher authorizing payment.

(3) No refund of moneys referred to in this section shall be made of an amount which is less than one dollar, except upon application.

(4) This section is the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury.

(5) When a taxpayer has pursued administrative remedies before the Department of Revenue pursuant to s. 213.21 and has failed to comply with the time limitations and conditions provided in s. 72.011 and s. 120.575, a claim of refund under subsection (1) shall be denied by the Comptroller. However, the Comptroller may entertain a claim for refund under this subsection when the taxpayer demonstrates that his failure to pursue remedies under chapter 72 was not due to neglect or for the purpose of delaying payment of lawfully imposed taxes and can demonstrate reasonable cause for such failure.

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
THE JOHNS BUILDING
725 SOUTH BRONOUGH STREET
TALLAHASSEE, FLORIDA 32399-1000

Bob Martinez, Governor
Van B. Poole, Secretary

MEMORANDUM:

TO: Joe Spicola, General Counsel, Office of the Governor

FROM: Van B. Poole, Secretary

DATE: June 20, 1988

Prior to the 1988 legislative session, a workshop meeting was held with industry representatives to discuss the Department's proposed legislation and to elicit their pledge not to add amendments to our bill. However, notwithstanding their pledge not to amend the bill, numerous amendments were added prior to the bill's passage.

After thoroughly reviewing CS for SB 1326, I believe a veto should be considered as the bill does not serve the public interest. It contains a number of controversial issues added as amendments which concern the Department:

1. An exclusive territorial sales amendment for malt beverage distributors helps to protect business investment which enhances the state's position as relates to tax collection. However, it also disallows situations where an individual retail vendor may go to any distributor in the state and seek the lowest price being offered. Also certain retail chains and pool buying groups object to this amendment.

2. A Viticulture Trust Fund amendment diverts an estimated \$225,000.00 of tax monies from general revenue to the Department of Agriculture for viticultural research.

3. An importation tax amendment that [sic] does not meet general industry needs. According to our records, this provision would grant three alcohol beverage producers located in Florida a 3.2 million dollar tax exemption on their products sold in Florida which are manufactured and/or distilled from state grown produce.

Joe Spicola
Page Two
June 20, 1988

From a legal point of view, it is our opinion that the import tax formula contained within the bill runs afoul of the Commerce Clause of the United States Constitution and is not salvaged by the Twenty-first amendment. A saving clause (or reverter clause) is provided which may or may not actually provide for a return to the taxing formula as it presently exists. If the savings clause is not judicially approved, imported beverages would be taxed at the low excise tax rate which would have a catastrophic impact on gross revenues estimated at a \$111 million dollar decrease.

In addition, should this import tax become law it will be attacked in the courts and the Department of Business Regulation will face lengthy and costly litigation.

Under the proposed tax structure the cost to regulate domestic products will be greater than the cost to regulate imported products on a per gallon basis. This tax provision does not promote the efficient use of state government resources. Also, the bill does not provide an appropriation to properly implement its mandate. It is estimated that it will cost the Department \$10,000 to implement this provision.

Inasmuch as certain provisions appearing in CS/SB 1326 also were included in other bills that passed, those provisions listed below would survive a veto of CS/SB 1326.

a. The provision revising the method of labeling malt beverages with the designation "FLORIDA".

b. The provision for licensing certain 50 unit condominium/hotel/motel in Dade County.

c. The provision for licensing certain premises operated by sports arena authorities.

The practice of adding substantive amendments to a primary bill (creating a "train") vitiates the committee system of the legislative process, thereby depriving interested citizens the ability to fully understand an issue and provide recommendations to committee members that could improve the final bill product.

VBP/sjc
CC: Ms. Amy Baker, Director of Legislative Affairs

TRANSCRIPT OF HOUSE DEBATE
ON JUNE 7, 1988
(Index omitted in printing)

(p.1)

SPEAKER: Are we ready for Representative Meffert? Representative Gardner, are we ready on Representative Meffert's bill now? Okay.

Representative Gardner moves that we do take up Senate Bill 1326 without objection. Without objection show that motion passed. Read Senate Bill 1326.

CLERK: By the Committee on Commerce. Committee Substitute for Senate Bill 1326. A Bill to be entitled "An Act Relating to Alcoholic Beverages" amending section 561.19, Florida Statutes, providing additional criteria with respect to license issuance.

SPEAKER: Representative Meffert, do you wish to take up the first amendment at this time?

MEFFERT: Yes, Mr. Speaker. Do you want me to explain the bill first?

SPEAKER: You can, yes. Yes, go ahead, Representative Meffert, explain the bill.

MEFFERT: Well, this is the alcoholic beverage bill that modifies the procedure for licensing winners of alcoholic beverage quota licenses. It places more stringent (p.2) operational requirements on persons issued quota licenses after September 30th of this year. The requirements for notifying the Division of inactive licenses are clarified.

Beverage manufacturers and wholesalers will no longer be required to purchase permits for delivery vehicles.

Vendors will be required to purchase permits.

Warrantless searches of alcoholic beverage delivery vehicles will be permitted.

The definition of sold beverages which comports with the Department's present practice is placed in statutes.

The bill makes some changes in the manner in which malt beverage is packaged for sale in Florida, may be identified.

It includes a provision which provides excise tax relief for Florida producers of wine and liquor by eliminating a portion of the tax for all producers and reinstating the exact amount of the decrease in the form of an import tax.

The bill allows alcoholic beverage licenses for condominiums with at least 50 (p.3) units which are operated as public lodging establishments in certain home rule counties.

It adds sports arena's authorities to the provisions which allow civic centers to obtain alcoholic beverage licenses.

It contains a provision requiring exclusive territories for malt beverage distributors be established and honored.

It establishes and funds a viticulture trust fund for promotion of products manufactured from Florida-grown grapes and viti-cultural research.

There are amendments on the desk, Mr. Speaker.

SPEAKER: Representative Gardner.

GARDNER: Mr. Speaker, I would request, sir, that we temporarily pass Committee Substitute for Senate Bill 1326 for the purposes or for the purpose of taking up a resolution and ask the members to take their seats.

(DISCUSSION OF CS/SB 1326 TEMPORARILY SUSPENDED)

SPEAKER: Representative Meffert, we are on the first amendment or are you still (p.4) explaining?

MEFFERT: I finished the explanation, Mr. Speaker. We are ready to take up the amendments.

SPEAKER: Okay. Read the first amendment. Representative King, for what purpose?

KING: Inquiry of the chair, sir.

SPEAKER: Yes, sir.

KING: Mr. Speaker, this inquiry I don't know whether should come through you or should come through rules. But since I don't know which I'll go to you because you are up there and Mr. Gardner is down there.

But under the rules as I understand them 7.16 says that all general bills affecting revenues, expenditures or fiscal liability shall be accompanied by a fiscal note upon being reported out of financing tax or appropriation.

Mr. Speaker, I guess my question is if the rules are there, can I use them?

SPEAKER: Representative Gardner?

GARDNER: Sure.

KING: I guess, Mr. Gardner, I guess the question is, is there a note of fiscal (p.5) responsibility from either Mr. Young or from Mr. Bell's withdrawal from the Appropriations Committee of this particular bill?

GARDNER: The rules were waived when we took the bill up. That means all the rules get waived when you take the bill up.

KING: Sounds like a "gotcha" to me.

SPEAKER: Representative Silver.

SILVER: Inquiry of Mr. Gardner. I am not fully understanding what you just said. Maybe I am a little slow on this, but all rules are not available at all regarding this entire bill on all amendments and everything? Is that what you are saying?

GARDNER: No, I said we moved the rules be waived to take the bill up. Rules still apply with respect to germanity and anything else.

SILVER: Well, I don't understand then the response to Mr. King's question because Mr. King is making reference to a rule which is regarding not taking up the bill but having a fiscal note attached to that bill. So why do we waive that particular rule?

SPEAKER: Representative Gardner, if we (p.6) could temporarily pass this until we make determination on that request.

GARDNER: All right.

SPEAKER: Representative Gardner, are you prepared to make any comments?

GARDNER: Mr. Speaker, actually, I don't think an official point of order was called. I think there was really an inquiry made and we've had--I can tell you what the basis of our discussion has been.

Basically, we have a Senate bill that is accompanied by a Senate fiscal note. It was pulled into the Finance and Tax Committee and pulled into the Appropriations Committee and later the rules were

waived and it was withdrawn from both of those committees.

Now, if you look at Rule 7.16, next to the last paragraph, it says in the event of any bill of this nature being reported favorably by the Committee on Appropriations, Committee on Finance and Tax without fiscal note having been prepared it shall be the right of any member to raise a point of order on second reading and the Speaker may, in his discretion, order return of the bill to the (p.7) appropriate fiscal committee. A precedent was established under 7.16 in April of 1969, where the Speaker, Speaker Schultz, held a point raised by a Mr. D'Alembert was well taken. The Speaker, in the language of Rule 7.16, may in his discretion order return of the bill or joint resolution to the appropriate fiscal committee. The Speaker therefore exercised his discretion and ruled that Committee Substitute for House Bill 353 would not be rereferred and instead the House would continue its consideration of the bill.

SPEAKER: There is also a precedent 7.16(b), December 8, 1969, where the Senate bill pending a motion to adopt the amendment by the Committee on Appropriations, where a point of order was raised. The House had not been furnished fiscal notes stating the financial implications but reached the same conclusion.

If the point is called, it seems the controlling issue would be that discretion and it would seem like the discretion of the chair would be affected by the fact that a fiscal note was in fact available through the (p.8) Senate bill and in fact had been available to both committees of reference to which it had been referred and there had been motions to withdraw from those committees and that would be a basis upon which to exercise discretion although there is no stated requirement for the exercise of discretion. Representative Patchett?

PATCHETT: Mr. Speaker, if I might I was going to suggest that within the discretion of the chair the bill was referred to both Finance and Tax and Appropriations yesterday, withdrawn today,

in other words it had resided in those committees for 24 hours which they were to look at the fiscal impact and I presume that our staff took the Senate fiscal note and used that in their deliberations so in this particular case I think we have if not in letter of the rule complied but within the spirit of the rule complied and I would concur with what the Speaker just said.

SPEAKER: Representative King.

KING: Well, Mr. Speaker, since I did make this an inquiry rather than a point and, since Representative Gardner and several other (p.9) representatives have explained to me where we are, I will not make it a point, however, I would like one piece of clarification now, now that that has been said.

Is the Senate fiscal note to be assumed to be the fiscal note attached to this House bill?

SPEAKER: Representative Patchett?

PATCHETT: Mr. Speaker, it is my understanding that the fiscal note as part of the message from the Senate is in fact that thing that we're dealing on and I am, the point of the subject matter that I just discussed I am implying that yes, I believe that it is the fiscal note, it did reside in our staff, and therefore, it is the fiscal note which complies with 7.16.

SPEAKER: So for purposes of compliance, although I think the, if you are not calling a point then we don't have to rule on it but it is within the discretion of the chair to make that and all I stated for background purposes was the existence of the fiscal note, would aid in that discretion.

So, Representative Meffert, you have the (p.10) series of amendments?

MEFFERT: Yes, Mr. Speaker.

SPEAKER: Representative Jones.

JONES: Mr. Speaker, apparently either that point was withdrawn or ruled upon or whatever, but at that point I did want to raise a possible other point of order under 8.16 and basically this deals with the special order calendar as we previously had adopted it. It talks about all the bills that had been reported favorably to go in to the Rules Committee and yet clearly the citator show that House bill 1416 has been defeated in Committee so for that purposes it wouldn't appear that the companion bill to this Senate is in possession of the House during this special or extended session, if we're going to continue to follow the rules that we adopted when we went in to special session and for that purposes I can't see how we could go ahead and take up this bill at this time.

SPEAKER: Representative Gardner or Simon. Representative Simon.

SIMON: Yes. Mr. Speaker, not with reference to the point but with reference to (p.11) the calendar and the business we have here tonight and with reference to the fact that there appears to be a substantial number of amendments on the desk that would really have to be looked at if we are going to expeditiously move through debate. I'm wondering if perhaps it might not be appropriate to temporarily pass this so we have an opportunity to review a couple of these amendments and perhaps review some of these points of order and then come back at whatever time, however long it takes to do that and more expeditiously then move through the process.

SPEAKER: Representative Gardner.

GARDNER: On Mr. Jones' point. This bill came over in messages after we had gone into extended session. There was a motion made to take the bill up instanter and frankly it passed without objection. It was immediately drawn in to the Appropriations Committee and the Finance and Tax Committee and that was, I

believe, yesterday, and then today it was withdrawn from those two committees and once again, we moved to waive the rules to make it up and that passed and that's where we are.

(p.12)

SPEAKER: While we are wandering around here I thought I would inform the House that since we are going to be in and out all evening we have arranged for food to be brought in, so you will be able to sustain your existence here.

Representative Meffert?

MEFFERT: I think we're ready to start the amendatory process but every time I offer one somebody jumps up, so we can see who jumps now.

SPEAKER: Okay, read the first amendment.

CLERK: Representative Meffert offered the following amendment on page 31, lines 20 through 26, strike all language and insert. Reading of the amendment, Mr. Speaker.

SPEAKER: Representative Meffert.

MEFFERT: This removes the Senate language regarding retailer shipments between wholesalers' territories.

SPEAKER: Is there debate?

Representative Silver?

SILVER: Mr. Speaker, I'm wondering on this bill since it's obviously a very (p.13) interesting one and I certainly would want to make sure everybody knew what they were voting on, if we could get some order because I could not hear the reading clerk even read the amendments on it. I do not know what's going on.

SPEAKER: Representative Meffert?

MEFFERT: I just explained the amendment. If there is no question or I'll answer questions, whatever is the pleasure of the House.

SPEAKER: Are there questions on the amendment?

Representative Rudd.

RUDD: Mr. Speaker, I believe Mr. Meffert is mumbling a little bit. I couldn't hear what he said.

MEFFERT: Well, sir, I had explained what this amendment does is it removes Senate language that, regarding retailer shipments between wholesalers' territories. This is a transshipment issue and we're taking that out of this bill. This is solely between beer wholesalers.

SPEAKER: All those in favor of the motion (p.14) signify by saying aye. (Aye). Opposed, no. (Silence). Show that adopted. Read the next amendment.

CLERK: Representative Meffert offered the following amendment. On page 10, lines 2 through 6 strike "all such beverages shall also have".

MEFFERT: This deletes language that Senate put on regarding a freshness expiration date with regard to malt beverages.

SPEAKER: Questions? Representative Lombard? Oh, sorry.

All those in favor signify by saying aye. (Aye). Opposed, no. (Silence) Show it adopted. Read the next amendment.

CLERK: Representative Meffert offered the following amendment. On page 11, line 26 strike "and all malt beverages" and insert. Reading of the amendment, Mr. Speaker.

SPEAKER: Representative Meffert.

MEFFERT: This clarifies that the import tax will not be imposed on malt beverage products. The Senate had put that in then took it out but didn't take it out in all places, so we're deleting the last reference.

(p.15)

SPEAKER: Is there debate?

Representative King?

KING: Just for clarification. What this does now is take beer out, is that what it does?

MEFFERT: Well, Mr. King, as the Senate bill came over beer is half in and half out and so this takes the other half out that they attempted to take out but didn't take out when they took the other half out so we're going to take it all out instead of half in.

KING: Don't suppose you'd like to have the other half in, would you?

MEFFERT: No, thank you, I know you've got an amendment to do that and we don't favor it then or now.

SPEAKER: Is there debate on that? Those in favor signify by saying aye. (Aye). Opposed, no. (Silence). Show it adopted. Read the next amendment.

CLERK: Representative Meffert offered the following title amendment. On page 1, line 17---

SPEAKER: Show the title amendment adopted without objection. Read the next (p.16) amendment.

CLERK: Representative King offered the (p.17) following amendment. On page 11, line 17 through page 27, line 9, strike all of said lines and renumber subsequent sections.

SPEAKER: I show another amendment in there, is that before Representative King's?

Representative Meffert, do you--?

MEFFERT: Yes, she's found my effective date amendment if she could read it instead of, before she reads Mr. King's?

SPEAKER: Okay, let's take that one then we'll take Representative King's.

CLERK: Representative Meffert offered the following amendment. On page 30, line 19, strike all language and insert. Section 13. Effective upon this act becoming a law, section 563.021 Florida Statutes is. . ." Reading of the amendment, Mr. Speaker.

MEFFERT: That's an effective date amendment regarding the malt beverage territorial amendment.

SPEAKER: Show that adopted without objection. Read the next amendment.

CLERK: Representative King offered the (p.17) following amendment. On page 11, line 17 through page 27, line 9, strike all of said lines and renumber subsequent sections. Reading of the amendment, Mr. Speaker.

SPEAKER: Representative King

KING: Thank you, Mr. Speaker. Quite frankly, members, here is the only portion of this bill that I oppose. And I am going to tell you very quickly, because I know part of the script calls to lay me on the table. And I know, or at least I sense that I know that I'm going to have a whipping coming, but before I have that whipping, I'm going to have my say and so here we go.

What we've got, what we have right here is a bill that we have passed four years ago, basically, just as it has been worded and four years ago, between now--between then and now, that bill was ruled unconstitutional. The Supreme Court, in the response to the constitutionality challenge, gave this one particular distiller, and that's what we're talking about here, we are talking about a tax advantage for one particular distiller, in one particular county, that if we enact it, (p.18) will amount to over \$4 million a year coming directly from your general revenues. In addition, if we enact this bill, the long-term down stroke according to the very fiscal notes that we have been instructed are to be considered fiscally attached to this amendment, to this bill, is \$111 million.

Now, members, all I ask is this--when you all sat here through the appropriation process and watched the thumbs up and watched the thumbs down and were told time and time again that we as a state could not afford to do the things that we were doing. Does it not strike you as being a little bizarre, perhaps even a little blatant, that in the final waning moments of this session, when all of us are tired, when all of us would love to go home, in comes from the Senate a turkey the size of the one that ate Chicago.

Now, while all of us were being told that we couldn't have our appropriations because the state could not afford it, we are now being asked to pass a bill that favors one distillery in this state, gives them another opportunity to go through the constitutionality (p.19) process again, they've just done it. In February, the Supreme Court ruled against this very same piece of legislation. Why, you say, are we now

considering again if the Supreme Court ruled? I'll tell you why, because it takes four years to come back through it and in those four years, this one distiller, in this one county, will have over \$12 million of Florida's general revenue money, your general revenue money.

And members, we're not talking about the legislation or the legislators giving this distiller a leg up. We're talking about the little people. We're talking about Representative Jamerson's low-cost housing. We're talking about Representative Mortham's school bus. We're talking about all of your people that you've wanted so desperately to bring money to, not getting a chance because we give one let up to one particular distiller in this state when it's already been proven unconstitutional.

I'd just like to say this one thing. Those who have been here know me as a businessman. Quite frankly, I consider myself a (p.20) damn good one. Now, let me tell you something. I don't mind competitive advantage if it's earned. I don't mind the competitive advantage of a better process, a better product, a better market, a better technique. But I am totally diametrically opposed to a competitive advantage that's going to be granted, legislatively, to a county to one distiller. That's not fair. It's blatantly wrong. It's been orchestrated to come at a particular time when we are at our all-time lowest.

I would urge you very, very strongly to please pass this amendment which keeps the rest of the bill whole, but just takes out the one odious portion of favoritism to one county that's unconstitutional.

SPEAKER: Representative Hargrett.

HARGRETT: Question of Mr. Meffert.

SPEAKER: He yields.

HARGRETT: Mr. Meffert, after having listened to that very emotional outpouring by Representative King, I just wanted to make

sure I understood really what we are doing. I understand--I think I understand, if you believe as Representative King believes, why (p.21) you could get emotional. But, as you know, Mr. Meffert, I've been sort of a leader in this legislature in trying to promote a wine industry, having studied the methods that have been used by other states as we learned that California had a raisin board that provided the leadership and now they have one of the leading wine industries in the world.

New York State created legislation that fostered good wine, good practices and some incubator legislation that enabled its wine industry to grow. Many other states have taken the same approach.

The question I have, and further as you know these efforts to create industry are all about creating jobs in Florida. Now the question that I have on this issue is since we are creating this legislation, if any other manufacturer locates in Florida and makes products--makes its products from Florida ingredients, will they also qualify for this, even if they were in another county in Florida?

MEFFERT: Mr. Hargrett, my understanding is yes, it does, and I, too, take issue with the comments made by the gentleman from (p.22) Jacksonville because it does, if they meet this standard, which is a requirement, the way it's written if it involves the use of Florida grown products, it involves producing in Florida and many states have promotional items for various things whether agricultural or manufactured in their states and, frankly, I wish at this point we could go further in promoting our own Florida products and those people who locate and furnish jobs in this state and who are very important and furnish these economic benefits. But there are problems with doing that, but other states have successfully done promotions of Florida [sic] products and I wish that we went further than we even go in this bill.

SPEAKER: The question recurs in the adoption of the amendments offered by Representative King. All those in favor signify by saying aye. (Aye). Opposed, no. (No). Fails. Read the next amendment.

CLERK: Representative Messersmith offered the following amendment. On the line following the enacting clause, insert new section 1. "Section 1. Subsection 6 of (p.23) section 210.02 Florida Statutes is amended to read. . ."

SPEAKER: Representative Messersmith.

MESSERSMITH: Thank you, Mr. Speaker. This amendment just provides for those cigarette wholesalers an additional six months in which they can pay for, or--I'm sorry, I can't talk, I lost my voice--the tax credit they get on damaged cigarettes.

SPEAKER: Representative Silver.

SILVER: Mr. Speaker, I would raise a point of order pursuant to 11.8.

SPEAKER: 11.8. Representative Gardner.

GARDNER: Why don't we pass over this amendment. Let me have a chance to look at it. We'll go to the next amendment.

SPEAKER: Show the amendment temporarily passed. Read the next amendment.

CLERK: Representative Messersmith offered the following amendment. On the line following the enacting clause, insert new section 1. "Section 1. Section 210.11 Florida Statutes is amended to read. . ."

SPEAKER: Representative Messersmith.

MESSERSMITH: Thank you, Mr. Speaker. (p. 24) This amendment allows the department to collect an interest rate on delinquent taxes.

SPEAKER: Representative Meffert.

MEFFERT: Yeah, this would codify a practice of the department and it's fine, there's no problem with it. It's noncontroversial.

SPEAKER: Is there debate? Is there objection? If not, show it adopted without objection. Read the next amendment.

CLERK: Representative Messersmith offered the following title amendment. On page 1, line 2, strike "alcoholic beverages" and insert "regulated activities amending section 210.11."

SPEAKER: Show the title amendment adopted without objection. Yes, ask that. That's a reasonable question. Is that title amendment to the second amendment or the first amendment? Second amendment. Okay. That's the right one. Read the next amendment.

CLERK: Representative Silver offered the following amendment. On page 27, line 9, after the period, insert section 12. "In the (p.25) event of the provisions. . ."

SPEAKER: Representative Silver.

SILVER: Thank you, Mr. Speaker. Ladies and gentlemen of the House--- This is the one on page 27, line 9, is that the one? Okay.

This is probably going to refer back a little bit to what Representative King brought out in his argument on his previous

amendment. But what the essence of this amendment will do is to put everyone in a status quo situation if and when this bill passes. On closing argument I will get into the constitutionality of this, but what would be sufficient for right now to suggest to you that one of the reasons why this bill is being offered it has been rumored, is for a competitive advantage. The court, as Mr. King stated before, has ruled that this type of statute is unconstitutional. What my amendment seeks to do is if everybody is going ahead in good faith, that all we will do is leave things at the status quo.

If the case is challenged in court, the amendment states that it is the intent of this legislature that a court enjoin the effective date of such sections until such time as final (p.26) adjudication of the constitutional challenge is made by the court of last resort. So in other words, nobody will have an advantage, nobody will lose anything, and the court will have an opportunity to decide the case on the merits, and the effective date will be postponed.

I think, and I have offered this as a solution before as an adequate measure if everybody is operating in good faith. If somebody wants to take advantage of this as it is rumored to be, then you obviously will vote against this amendment and substantiate that theory. I would move the amendment.

SPEAKER: Representative Simon.

SIMON: Mr. Speaker, I move a substitute amendment. It will be the first amendment that bears my name.

SPEAKER: Okay, read the Simon substitute.

CLERK: Representative Simon offered the following amendment on page 11, line 3 through page 27, line 9, strike all of said lines.

SPEAKER: Representative Simon.

(p.27)

SIMON: Yes, if I may. Ladies and gentlemen, you just heard an explanation from Representative Silver and I'm going to use the exact words. You heard an explanation from Representative Silver of what his amendment seeks to do. His amendment is about five lines long. It seeks to do what it is Representative Silver represents that it seeks to do. Unfortunately, it don't do that. And don't do anything. There is a right way and a wrong way to do what Representative Silver would like to do.

The right way to do it is a bit more complicated, and requires a more lengthy amendment.

Representative Silver's amendment has no legal force of effect whatsoever. What it says is, in the event that provisions of the act are challenged by any court, it is the intention of the legislature that a court enjoin the effective date. That means nothing. It means the court might do it. It means the court might not do it. It is purely and entirely discretionary with the court which means it is of no legal force and effect.

(p.28)

Now, conversely, in the event that one could construe Representative Silver's amendment differently, in the event one could construe Representative Silver's amendment as a mandate to the court to file some type of an injunction in the event that the case is challenged, then his amendment is likewise unconstitutional because it interferes clearly and obviously with the separation of powers doctrine inasmuch as injunctions are a matter solely within the purview of the court and we cannot dictate when a court enters an injunction.

What we have done with this amendment I'm offering as a substitute is really an attempt to get us to where we need to be relative to the constitutional question. We have inserted what's known as a failsafe provision. The failsafe provision in effect says that if there is a challenge and an order is entered, if it's either a preliminary order or a

final decree, if any preliminary injunction or final decree is entered by the court, then the law would revert back to the law as it previously existed before this new (p.29) provision went into effect. That is the right way to protect the interests of the State against a challenge of constitutionality.

In other words, if the bill passes with this amendment on it, there certainly will be a constitutional challenge. I don't think anyone denies that. But what we're saying with this amendment is the court could then at its discretion enter an injunction. If the court enters that injunction, then the law of the State of Florida reverts back automatically to the law that existed before we made the changes with this new statute. I have to tell you constitutionally that is the right way to go where Representative Silver wants to be.

Now to even perfect it more, Representative Jones has a couple of technical amendments to the amendment which will put us in a posture which I think will give us the strongest possible constitutional position to preserve the interests of the State upon passage of this law, and I would yield to Representative Jones for purposes of the amendments to the amendment.

SPEAKER: Read the amendment to the (p.30) amendment.

CLERK: Representative C.F. Jones offered the following amendment to the amendment offered by Representative Simon. On page 5 line 11, strike "from fresh fruit" and insert "of produce. . ."

SPEAKER: Representative Jones on the amendment to the amendment.

JONES: As has been pointed out there is a constitutional issue involved in the whole round. Our whole-hearted effort here is to protect something that's been in Florida for some 27 years. It was

first granted to Old Florida Rum. And we have been using Florida raw materials to make alcohol now for yea these many years. Constitutionally, we are pursuing the concept that is being used in Georgia, and we're addressing agricultural products grown on land inspected by Florida agricultural inspectors to clarify what we're doing, and that's the thrust of this amendment. I would urge you to adopt my amendment to Mr. Simon's amendment.

Move the amendment, Mr. Speaker.

SPEAKER: Questions of the amendment? (p.31) Debate on the amendment to the amendment? Objection to the amendment to the amendment? Without objection show the amendment to the amendment adopted. On the amendment as amended. On the next amendment, read the next amendment to the amendment.

CLERK: Representative C.F. Jones offered the following amendment to the amendment offered by Representative Simon. (p.32) On page 5, lines 7 and 8, strike all . . .

SPEAKER: Representative Jones, you're recognized.

JONES: This is the same language in another section of the bill. Agricultural land inspected by Florida agricultural inspectors. I move the amendment.

SPEAKER: Is there objection to the amendment to the amendment to the substitute amendment? Without objection show the amendment to the substitute amendment adopted. Read the next amendment to the substitute amendment.

CLERK: Representative C.F. Jones offered the following amendment to the amendment offered by Representative Simon. (p. 32) On page 15, lines 19 and 20, strike all.

SPEAKER: Representative Jones on the amendment to the substitute amendment.

JONES: "of produce from land inspected by Florida agricultural inspectors" in another section.

SPEAKER: Are there questions on the amendment to the substituted amendment? Is there debate? Representative Rudd, for what purpose? A question of Representative Jones. Representative Jones yields to a question by Representative Rudd.

RUDD: Mr. Jones, if another state wanted to sell a product to this particular company we're talking about, could they make an arrangement to have that product inspected by a state inspector of the State of Florida and then have it shipped therein, into the state?

JONES: We're speaking of produce from land inspected by Florida agricultural inspectors. Florida agricultural inspectors do not inspect land in other states.

RUDD: I want to know about special arrangement, if it were to that state's (p.33) advantage to move their product to our area, could that arrangement be made?

JONES: It's got to be growing in Florida on Florida land inspected by Florida inspectors and you don't do that in other states.

SPEAKER: Further questions, is there further debate? Is there objection to the amendment to the substitute amendment? Without objection, show the amendment to the substitute amendment adopted. Now we're--is there objection? All those in favor of the amendment to the substitute amendment, Representative Messersmith for what purpose?

MESSERSMITH: Mr. Speaker, I think we should send a Sergeant of Arms up to remove Representative Hodges from the

gallery when he needs to be down here doing the peoples' business.

SPEAKER: The Speaker does not see Representative Hodges. Now on the substitute amendment as amended. Representative Simon to close on the substitute amendment as amended. Representative Silver, do you have a question? Representative Simon on the (p.34) substitute amendment.

SIMON: Yes. Members of the House, this is a bill which by its very nature gives rise to constitutional questions. It deals with probably the most complicated and difficult area in American constitutional law, that being, state taxation of articles and activities in interstate and foreign commerce, further complicated by the fact that there is also a twenty-first amendment ramification.

It is an area that is extremely difficult. It is an area which is changing. It's an area that's very delicate. I have requested that this particular provision go on the bill in order to protect the state to the greatest extent humanly possible under the law as we now know it, against a constitutional challenge. By adopting this particular amendment we put the state into a position where, in the event the law cannot be sustained, the interests of the state and the tax that's being collected by the state will not be at risk. So this is a good amendment to protect the best interests of the state. I urge the members to adopt it.

(p.35)

SPEAKER: Representative Silver, since this will eliminate your amendment, you're recognized to close.

SILVER: Thank you, Mr. Speaker. Ladies and gentlemen of the House, I have a couple of comments on Representative Simon's statements. Number 1, I guess the first thing you say is, when you don't have anything good to say about something, you go and attack somebody, and I guess that's what has occurred in this instance.

Representative Simon said, and I bring to his attention--we both went to the same law school, and I don't know if Representative Simon knows this or not but I received the second highest grade in constitutional law at the University of Miami--but it seems to me, Representative Simon represents what people don't like about attorneys so much and that is that he tries to complicate things. I said mine--he attacks me for drafting an amendment in five lines where he attempts to take several pages to do it, so thusly, I think that people would understand mine a lot easier and a court would decide a lot easier than (p.36) Representative Simon's long duration and complicated method.

But the fact of the matter remains the same. Whether you adopt Representative Simon's amendment or you adopt mine, there is a constitutional question involved here. It's one that I would suggest to you that we not affect the revenue stream of the State of Florida, that if we don't adopt my amendment, we will do that, and thus I would urge the defeat of Representative Simon's amendment.

SPEAKER: So the question recurs on passage of the substitute amendment by Representative Simon. All those in favor of the substitute amendment, let it be known by saying aye. (Aye). All opposed, nay. (No). The substitute amendment passes.

Read the next amendment.

CLERK: Representative Simon offered the following title amendment on page 1, line 17 after. . .

SPEAKER: Title amendment without objection. Show the title amendment adopted. Read the next amendment.

CLERK: Representative C.F. Jones (p.37) offered the following amendment on page 14, line 29 and 30, strike all of said lines and insert "for sale in this state if. . ."

SPEAKER: Representative Jones.

JONES: What we're doing is putting this in two places. In the language that Mr. Simon has and in another section of the bill. We're doing the same wording that we had in the previous three amendments in another section of the bill. I would urge you to adopt these amendments.

SPEAKER: Are there questions on the amendment? Is there debate on the amendment? All those in favor of the amendment acknowledge by saying aye. (Aye). Opposed, nay. Amendment passes. Read the next amendment.

CLERK: Representative C.F. Jones offered the following amendment. On page 15, line 2 after "made," strike "from fresh fruit."

SPEAKER: Representative Jones.

JONES: Same amendment, Mr. Speaker, in another section.

SPEAKER: Are there questions on the amendment? Debate on the amendment? Objection (p.38) to the amendment? Without objection show the amendment adopted. Read the next amendment.

CLERK: Representative C.F. Jones offered the following amendment. On page 25, lines 5 and 6, strike all. . .

SPEAKER: Are there questions on the amendment? Is there debate on the amendment?

JONES: Move it.

SPEAKER: Is there objection to the amendment? Without objection. Without objection show the amendment adopted. Read the next amendment.

CLERK: Representative Silver offered the following amendment. On page 27, line 10, insert new section 12 and renumber subsequent sections. "Section 12. Paragraph 1 of. . ."

SPEAKER: Representative Silver on the amendment. You're recognized.

SILVER: Is it page 27, line 10? Mr. Speaker, ladies and gentlemen of the House, what this will do is reduce the licenses, it's a quota license amendment. Instead of having one for every 2500 people, provide for one every 6,000 people. What this will do will establish a uniform method of quotas (p.39) across the state. Right now we have some areas that have one in 5,000, one in 2,500, one in 4,000, whatever the case might be. What this seeks to do is establish one uniform method across the state, one for every 6,000 people.

SPEAKER: Representative Meffert. For what purpose?

MEFFERT: Mr. Speaker and members, I'd urge you to not adopt Representative Silver's amendment. What he's attempting to do here is on the floor to rewrite the number of quota licenses. This hasn't been in committee. We haven't had a chance to look to see what the effect of this would be, what impact it would have on various of your counties, but is a drastic change because it's almost two and a half times the number of population before a quote [sic] license would be issued. It's a substantial policy change and I have no way to explain to you the effect of any of you in your districts or anywhere else and its tremendous impact and I would urge a negative vote on the amendment.

SPEAKER: Representative Silver, do you (p.40) want to close on the amendment?

SILVER: No, I guess we could have a detailed analysis of the amendment as we've had on this bill as far as the financial impact is concerned, but I guess I will just use that in my closing argument, the argument of Representative Meffert, that he just used. Would urge the adoption of the amendment.

SPEAKER: So the question recurs on final passage of the amendment by Representative Silver. All those in favor let it be known by saying aye. (Aye). All those opposed, nay. (No). Amendment fails. Read the next amendment.

CLERK: Representative Simon offered the following amendment. On page 33, strikes lines 9 to 11, insert. "Section 18. Except as otherwise provided. . ."

SPEAKER: Representative Simon, you're recognized.

SIMON: Yes, this is just a technical amendment which conforms an effective date on the new section we put into the bill.

SPEAKER: Technical amendment without objection. Show the technical amendment by (p.41) Representative Simon adopted. Read the next amendment.

CLERK: Representatives Wise and Troxler offered the following amendment. On page 2, line 10, insert "Section 1. Section 847.013, Florida Statutes. . ."

MEFFERT: Point of order, Mr. Speaker, on 11.8. This deals with obscene motion picture theaters and all kinds of things that's no way near germane to this bill.

SPEAKER: On the point, Representative Wise.

WISE: Mr. Speaker, tangentially, this effects the alcoholic establishment when they're serving alcohol and that's why we put the amendment on.

SPEAKER: On the point, Representative Gardner is going to look at the point. Let's temporarily pass this amendment while Representative Gardner looks at the point of order. Read the next amendment.

CLERK: Representative King offered the following amendment. On page 11, line 20, strike "and malt beverages" and insert nothing. Reading of the amendment, (p.42) Mr. Speaker.

SPEAKER: Representative King on the amendment.

KING: Thank you, Mr. Speaker. You know, people have filed by my chair and said how could you possibly have spoken so arduously against somebody who creates jobs, because in the original bill, with the original liquor distiller, we're talking about the protection supposedly of 300 jobs. Okay. Anticipating that that might have been an argument I came up with this other amendment, and basically what it says is this. If you believe that what we do for the one liquor distiller is fair, and if you believe that what we do for the few Florida wineries is fair as it relates to the protection of jobs and the creation of employment, then you'll love this one, because what it does is it says if we're going to do it for wine, and we're going to do it for liquor, then let's do it for beer. Yeah, let's do it for beer because, you see, Jacksonville has a brewery, Tampa has a brewery. Between those two breweries they employ over 3600 people.

Now, the original amendment drawn to the (p.43) liquor distiller is drawn on the basis that we are protecting jobs. I'm going to give you an opportunity to protect a bunch.

If you believe it's fair to do for this Florida distiller and the Florida wineries, then why not let's do it for the Florida brewers, and I move the amendment.

SPEAKER: Representative Meffert, you're recognized.

MEFFERT: Mr. Speaker, members of the House, you know, when--if Mr. King looked at our beverage laws he'd see exceptions to the tied house evil law that are held by the particular distiller in question, that they are the only distiller to my knowledge that has a retail alcoholic beverage license in this state. They have not been treated shabbily at all and yes, we have encouraged, we tried to encourage Miller's to locate their brewery in Florida, but they went over the line. That was their choice. That goes back to your argument about businesses, Mr. King, and being a businessman.

The fact of the matter is that we have all through these laws and not only here, the (p.44) premium tax ought to be fairly near to where you live, with domestic insurers versus out-of-state insurers. It's not uncommon for this legislature to consider those people and their economic impacts that they have in various ways and various parts of the state.

To my knowledge, Anheuser Busch has not sought this amendment, in fact, this was a part of the Senate bill at one point and they took it out. We finished doing that on our earlier amendment that I pointed out. The fact of the matter is we don't need to adopt this amendment and without talking on too long, I would just urge a negative vote on Mr. King's amendment.

SPEAKER: Representative Figg, for what purpose?

FIGG: For a question of the sponsor of the amendment. As I understand it, Mr. King, your amendment would prohibit importing

beer without a big tax on the little people about which we were speaking earlier, but that's beside the point.

I have an Anheuser Busch brewery in my district, too, in Tampa, Florida, and suppose (p.45) they wanted to import their own beer, would they have to pay, would we have to pay a tax on their imported beer but not their made-in-Florida beer? Well, my, my, my.

SPEAKER: Representative King, I recognize you to close on your amendment, and you can respond.

KING: Very, very quickly, Mr. Speaker, because you know, I can see that the troops are lined up and the salvos are heading my way but before I'm done, one last thing.

A past speaker of the House, when I first got elected to this office, in response to a question I asked to him about a vote, said, "Jim, you gotta dance with who brung you." Well, folks, the people who brung me are constituents in District 18, and they put me here under the basis that I promised that I would do the best that I could for them. And I really believe, or I wouldn't be speaking here, that what we are doing in this particular amendment, in this particular bill is wrong. I was against it from the start. But if you want to give a leg-up competitive advantage, then let's do it for wine, for (p.46)beer and for distilled spirits. Move the amendment, Mr. Speaker. Thank you.

SPEAKER: So, the question recurs on passage of the amendment by Representative King. All those in favor let it be known by saying aye. (Aye). All those opposed by saying nay. (No). And the amendment fails. Read the next amendment.

CLERK: Representative King offered the following amendment. On page 11, line 27, strike "and malt beverages."

SPEAKER: Show that amendment withdrawn. Read the next amendment.

CLERK: Representative Lippman offered the following amendment. On the line following enacting clause insert "Section 1. Effective October 1st, 1989. . ."

SPEAKER: Representative Lippman, you're recognized.

LIPPMAN: Mr. Speaker, I believe you ought to temporarily pass that because it's on a point, the other point was. . .

SPEAKER: Representative Meffert has the point of order on germanity as well on this particular point which we temporarily passed, (p.47) however, there are no other amendments.

SPEAKER: Representative Messersmith.

MESSERSMITH: Mr. Speaker, I was just going to say we have temporarily passed an amendment on a point of order which is. .

SPEAKER: We have two amendments on points of order, three amendments on points of order. Representative Silver.

SILVER: I--Mr. Speaker, I withdraw my point of order on the Messersmith amendment. I'm withdrawing my point of order on the Messersmith amendment.

MESSERSMITH: I know you are, but I just wanted to see if you had some work to do.

SPEAKER: Okay, in that case, Representative Messersmith, we are now on your amendment having shown the point of order by

Representative Silver withdrawn. So, would you like to discuss your amendment?

MESSERSMITH: Thank you, Mr. Speaker. I'd just like, you know, it's an amendment that allows wholesalers six more months in which to file for tax refund on damaged cigarettes.

SPEAKER: Is there debate? All those in favor signify by saying aye. (Aye). All (p.48) those opposed, no. (No). Show it adopted. Representative Meffert.

MEFFERT: I'm going to withdraw my point of order as to Mr. Lippman's amendment and I understand he'll withdraw his amendment if the point is withdrawn.

SPEAKER: Representative Meffert withdraws his point of order. Representative Lippman withdraws his amendment without objection and the title amendment. So, Representative Gardner, they're messing up your entire program here.

GARDNER: Well, I got to tell you, Mr. Speaker. I'm really disappointed. Because I thought we had one for the record books here, but that's the way it goes.

I guess I'm ready to give you a recommendation on the amendment by Representative Wise. The bill as it currently has been amended deals with the alcoholic beverage tax chapters of the Florida Statutes and it now deals with the tobacco tax section of the Florida Statutes. That's the 500 series in Chapter 210. The amendment deals with Chapter 847, so it's definitely a different (p.49) chapter. The bill deals with alcoholic beverage taxes and cigarette taxes. Chapter 847 deals with obscene literature and profanity. Now, the particular section that Representative Wise's amendment goes to deals with obscene performances, I guess, in establishments that serve alcoholic beverages and I would submit to you, sir, that it doesn't satisfy any of

the three legs of the stool, goes to a separate chapter, it's definitely a different subject, and it unduly expands the bill.

SPEAKER: So the chair will rule that the point is well taken since the amendment goes to a different chapter, different subject and unreasonably expands the purpose of the bill. There is one further title amendment by Representative Messersmith. Read that.

CLERK: Representative Messersmith offered the following title amendment on page 1, between lines 2 and 3 . . .

SPEAKER: Show that adopted without objection. Further amendments?

CLERK: None on the desk, Mr. Speaker.

SPEAKER: Representative Messersmith moves the rules be waived and Senate Bill 1326 (p.50) read a third time by title. Is there objection, is there objection, without objection, read it.

CLERK: By the Committee on Commerce, Committee Substitute for Senate Bill 1326, a bill to be entitled "An Act Relating to Alcoholic Beverages Amending Section 561.19 Florida Statutes."

SPEAKER: So the question—debate. Representative Silver.

SILVER: Speak against the bill for a brief moment, Mr. Speaker.

SPEAKER: You're recognized.

SILVER: Mr. Speaker, this bill is attempting to cure a problem that I know that Mr. Jones and Senator Crawford and others are concerned about. Senator Crawford is a personal friend. He's a good

senator, and he suggests to me that his purpose in doing this is to save substantial amount of jobs down in that particular area of the state. I am not objecting to the bill on the basis of what the motive is because I believe that's a good motive and I believe that is what Senator Crawford's motive is. But I am objecting (p.51) more to, I guess the procedure on this particular matter.

We have a financial statement here from the Senate Financial, fiscal impact statement, and I just want to tell you what it does because I think we're establishing a dangerous precedent or establishing a threshold here which has not been established before. Because both committees, F&T and Appropriations brought this bill into their committee yesterday, we never had a chance to discuss this bill before a committee, there was never a hearing before the F&T or Appropriations Committee. But listen to what the impact is on the people of Florida for this bill that's never been heard in the House. And this is from the Senate report.

If this amendment, and they're talking about the amendment which is the subject matter of this bill, if the amendment were to survive constitutional challenge, a tax break for \$3.4 million dollars would be provided to Florida producers of alcoholic beverages from the general revenue fund.

If the impact [sic] tax is declared (p.52) unconstitutional, approximately \$111.5 million dollars of 1988 to '89 general revenue monies would be at risk. Ladies and gentlemen, I would suggest to you, whenever you see a fiscal report like that, that at the very least you ought to have a hearing before a committee so that all the facts can be brought out. That is what is the problem here. We have a substantial impact that may or may not occur and what was going to happen is, if this law is declared unconstitutional, the Department of Revenue is going to have to go out and refund money to all these people that we are collecting these dollars from.

I would just suggest to you and I know Representative Simon is probably going to think this is worthless because it is coming out of my mouth, I would read to you as a quote from a court, that's a quote from a court, Representative Simon, it's not my quote, it's from the Florida Supreme Court, but you may not have any faith in them, either.

"When a state statute directly regulates or discriminates against interstate commerce or where its effect is to favor instate (p.53) economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Without further inquiry is what the Supreme Court said. That's how bad statutes such as this are.

So, ladies and gentlemen, I just want to make sure that when you vote you have all the facts before you. You now have all those facts, and there it is, and therefore I would ask you to defeat this bill.

SPEAKER: Representative Simon.

SIMON: Yes, ladies and gentlemen, Representative Silver has raised a real legitimate point relative to the bill and that is the question of constitutionality of this provision. As I explained earlier, the area of state taxation of articles and activities in interstate and foreign commerce is probably the most complex area and most difficult area in American constitutional law. It has been referred to in several United States' Supreme Court cases as "our perennial problem." Cases come up year after year after year.

We have had a number of cases which have stricken down other statutes. When those (p.54) cases have come up there was not a requirement to refund the money. That was not a problem at that time. There has been a similar case involving more recently a similar statute that was adopted by the State of Georgia. It was sustained by the Georgia Supreme Court and they attempted to go to the United States

Supreme Court, and the United States Supreme Court chose not to overturn that decision.

Consequently, I will not stand up before you and say with certainty that this new provision will withstand a constitutional challenge, nor will I stand up and state with you with certainty given the complexity of it that it will not withstand the constitutional challenge. It may be that Representative Silver is right when he says that it will not. It may be that I'm right when I say it will. In the final analysis, this is a matter which is going to court and the court will decide.

The risk to the state as enunciated in the fiscal note in the Senate was a potential risk to the state before we put on the failsafe amendment. Putting on that failsafe amendment has in my judgment eliminated any (p.55) possible exposure to the state in the event of a ruling of unconstitutionality. If we pass this law into effect on July 1, for sake of example, and if on July 2nd of this year or a year later or whenever there is a determination in any court that it is unconstitutional, we will immediately revert back to the previous law and there will not be a loss of even dollar one to the State of Florida. We have structured this complex question in the best possible manner to protect the interests of the state while at the same time trying to give an economic advantage to some extent to some industries that we have, agricultural industries in our state.

The State of Georgia has tried it. It was successful. It may not be to many people the most desirable way to deal with this problem, however, it's a very legitimate way to pursue this problem, and I say although some people might think it's constitutional, some people may think it's not, you've all heard me stand up before and say not to vote for a bill when it was a settled matter of constitutional law, that it was a violation. (p.56) And you've seen me do that on some bills that were politically very, very popular. But I don't care which way you fall out on this bill politically.

I'm not going to tell you this is a settled matter of constitutional law because it's not, and since it is not a settled matter of constitutional law, I would just suggest that you vote on the bill on its merits. If you think the substance of the bill is right, vote yes or let the courts decide. If the courts rule that we can't do it, there will be no risk of funds to the state. We've got it structured as well as we can given the circumstances.

Thank you.

SPEAKER: Representative Langton.

LANGTON: Thank you, Mr. Speaker. Ladies and gentlemen of the House, in opposition to the bill, very briefly.

We've given away under the guise of economic development \$30 million dollars for a baseball stadium. We are now ready to give away another \$111 million under the guise of economic development for the wine industry. (p.57) If we continue to operate as an economic redevelopment agency instead of a state government, we're not going to have any money to build roads, to build prisons or to operate schools which are the primary functions of state government, not to act as an economic development agency.

Please vote against this bill.

SPEAKER: Representative Hargrett.

HARGRETT: Speak in favor of the bill, Mr. Speaker. Ladies and gentlemen, what we have here is a measure that's designed to build an industry in Florida, to create job opportunities in areas where jobs are needed.

Now, one of the things I want you to take note of, we've had a freeze line in this state that's been moving further south. You know, you used to be able to grow citrus up in, as far as Lake County. And that, every year, when we have these freezes we freeze out these

groves and you know it takes about seven years or more to get a new grove producing. Well, a lot of these families that were growing citrus have gotten up in age and they just, it just takes too long, and so these grove (p.58) lands have been abandoned and it's had an impact on the economy of large sections of our state. What this bill does is encourage new agricultural crops that can grow in these areas, grapes and other crops that will withstand cold.

In addition to the agricultural encouragement, what we are talking about is creating an industry in Florida that's one of the largest industries in the world, that is, producing wine and spirits, and so for somebody to say that this is a giveaway program and equate it with spending something on a baseball stadium is just patently wrong. It's not a giveaway program, it's a program that's been successfully operated in a lot of states where they protected their industries; their infant industries, allowed them to grow, create jobs and economic development, then the multiplier effect of all the taxes that are paid by the workers. And so, ladies and gentlemen, we have an opportunity here to foster good solid economic development not only in the manufacturing area, but in the agricultural area as well. And I can think of (p.59) no better way to foster growth in certain parts of Florida, especially the central Florida area.

I urge you to support this good bill. We've done it before. We had a problem and we're here to correct the problem, and I urge you to support the good bill.

SPEAKER: Representative King.

KING: Very, very, quickly. You know, ladies and gentlemen of the House, my newspaper, up there, have written correctly three separate articles about this particular bill. You know, and what they've said is, tongue in cheek, they've said there's no way that the House of Representatives is going to stand in the way of this bill. That the steamroller is rolling, and we're going to just acquiesce and off we'll go.

Well, folks, I want to go back to Jacksonville, in a matter of hours, hopefully, and face my opponent as each of you will face your opponents and be able to look him in the eye and say I voted as correctly as I knew how to vote as often as I voted. And the point that bothers me about this, I've made some (p.60) bad votes before, I'm sure, but they were errors of omission, not commission. In the waning hours of the session, when everybody is tired is not a good time to take up a bill that has a potential, Mr. Simon, a potential \$111 million negative revenue stream to this state.

Now all I'm telling you is this. Now, you can go along with the flow and you can follow the script if there is one, I don't know there is. No scripts. You can go on with -- scratch script -- you can go and vote your conscience, and I hope that when you vote your conscience, you'll recognize that what we're doing every time we do it makes it more possible and probable that we're going to do it again, and again, and again.

Right is to vote against this bill because it's right for the people of this state.

Thank you.

SPEAKER: Representative Jones.

JONES: Thank you, Mr. Speaker. Now, when Duval County wanted some help with the insurance industry, I followed the script. I (p.61) stayed with you, honey, and there's no difference. You got a lot of jobs up there as a result of that and I submit to you that the 300 jobs in Polk County that this represents, that's been there for 27 years, means a lot to me and I'm asking you to help me out. I hope that's clear.

SPEAKER: Representative Martin.

MARTIN: Mr. Speaker, what I'd like to say is something to the representative from Duval County. I was one of the leaders fighting

for Mayo Clinic to come to Duval County which means more to Duval County than anything else that I know of. I did it because I thought it was right. Some of my people in my county, Shands and all the rest, didn't like it. But I did it because Duval County needed jobs and they needed medicine.

Mr. King is one of the greatest orators I've ever seen in not telling all the facts. Nothing from nothing is still zero, and when you take the tax at Polk County today, several years ago, we said that anyplace in the State of Florida would make certain types of alcohol, they would be exempt. That was to help Florida (p.62) industry.

Now, when I was growing up in Hawthorne we used to take the cane skimmings and pulp and make some of the finest things you've ever drank. It was old buck and it was completely tax free because the sheriff couldn't catch it. But you're not losing any money when you're not taxing and letting it go.

For the last four or five years we knew what we was [sic] doing, we didn't put that money in the budget, we know what we doing now [sic]. So I say to my friend, Representative King, look at your insurance industry that all of us helped vote in and look at Mayo Clinic which we all held our nose but Duval County needed it.

SPEAKER: Representative Meffert.

MEFFERT: Mr. Speaker, members of the House, you know, they get all this debate. I got an excellent bill here, but the great thing about chairing Regulated Industries is they come to you and say "I got a little amendment." All they're talking about is one amendment. Let me tell you, there is -- this (p.63) thing is an important bill, as Mr. Mitchell's viticulture bill is, it has simplified those people that are in this business with their delivery vehicles, it deals with reforming and simplification of the quota licensing process. There are many issues in this bill. It includes the territorial part of the beer franchise bill that was not passed

earlier in the session.

This is a good bill. There are situations, the beverage license for certain condominiums that I know many in Dade are interested in, and this amendment is another issue like many that come up here. Mr. King and the Duval delegation I'm sure, how many articles did your paper write against the premium tax for domestic insurers, Mr. King, how many will we see before next session, to not treat domestic insurers that are domiciled in Florida differently from other insurance companies. It's no different from anything else we've done and the consideration is good, the figures that have been bounced about about the possible fiscal impact have been improved, largely saved. We believe that our (p.64) chances of risk are negligible in the courts with the work that Mr. Simon and others did on the savings clause amendment. So I submit to you the bill is an excellent one. We accepted an amendment to it. That's part of the process.

There is nothing wrong in the world with supporting this bill and with that, I would urge your favorable consideration.

SPEAKER: So question occurs on the final passage of Senate Bill 1326. The clerk will unlock the machine and the members will proceed to vote. The clerk will lock the machine and announce the vote.

CLERK: 103 yeas, 12 nays, Mr. Speaker.

SPEAKER: So the bill passes.

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(p.65)

EXCERPT FROM SENATE, FINANCE, TAX
AND CLAIMS COMMITTEE HEARING

May 19, 1988

(Amendments to CS/SB 1326
are being offered and discussed)

(p.66)

CHAIRMAN: Now, we have one more, I believe.

SENATOR JENNINGS: Yes. This is the alcoholic beverage bill, we call it, dealing --

CHAIRMAN: Where is it?

SENATOR JENNINGS: -- pretty much---

CHAIRMAN: Okay, that's tab 21. That's 1326.

SENATOR JENNINGS: The major provisions of the bill are concerned with enhancing the Department of Business Regulation's ability to regulate and enforce the alcoholic beverage code. Included are things, for example, that permit a person to know whether he or she qualifies for the license before they have to go through all of the financial cost of getting the license, because there are some people who are not going to qualify no matter what.

Technical things, for example, requiring the license to be operational for at least eight hours a day for seven months out of the year so that people don't just warehouse licenses, clarifying the Department's authority concerning the warrantless searches of (p.67) vehicles used to transport alcoholic beverages. Expands the definition

of the word "sold" and reduces administrative costs. Sounds like motherhood and apple pie. Oh, and allows your beer cans to have "Florida" stamped on the top instead of the bottom.

CHAIRMAN: Oh, here he is. Okay. We have Senator Crawford with us who has some amendments.

SENATOR JENNINGS: - That's what he thinks. Crawford, what have -- Can we recall his bill back to my committee?

CHAIRMAN: Okay, everyone has the amendments?

SENATOR JENNINGS: Are those all his amendments?

CHAIRMAN: Well, there are only eight.

SENATOR CRAWFORD: It's eight.

CHAIRMAN: Okay, the first amendment by Senator Crawford is on page 1, line 11, insert a lengthy amendment.

SENATOR CRAWFORD: Okay, yeah, this is not the major amendment. This has to do with hotels who have, if you have 100 rooms or more you are entitled to a liquor license. If you (p.68) change the status of them to condominiums but you still rent them out as hotel rooms but now you are not specifically under the definition of a hotel, you would lose that and I think what this amendment does is says that you can still keep, you don't lose the license because of that.

SENATOR JENNINGS: I am unaware of all of these amendments, so we will have to work backwards. Can we get an example of something like that?

CRAWFORD: Anybody here has an example?

SENATOR JENNINGS: And a live body, tell me who that helps.

UNIDENTIFIED SPEAKER: (Unintelligible.)

SENATOR CRAWFORD: Right.

SENATOR JENNINGS: But still keeps a restaurant?

UNIDENTIFIED SPEAKER: (Unintelligible.)

SENATOR CRAWFORD: Right. But you still have to have at least 51 per cent of them as guest rooms just like it's a hotel so it's still a hotel. Just under the technical definition of a hotel that it is no longer a hotel, so this would say if you still have (p.69) 51 percent of the rooms in the pool, then you could still keep your restaurant, your liquor license there.

SENATOR JENNINGS: Well, since those who are most interested in it didn't see fit to chat about this with me, I have no idea what this bill does, nor does my staff. So --

SENATOR CRAWFORD: This one came to me late yesterday also.

SENATOR JENNINGS: Senator Crawford, would you like to tell us whose bill this is, I mean whose amendment it is. We are aware of some problems with things, I'm not necessarily aware of a problem with this. So we may have no opposition to it. I just don't know anything about it.

SENATOR CRAWFORD: Senator Margolis asked me to do this yesterday afternoon. I said it sounded all right, so that's where it came from. She's down in, I guess, Appropriations.

CHAIRMAN: Doesn't this go to Appropriations when it leaves here?

SENATOR JENNINGS: Yes, and, you know, it's the will of the Committee, as I said, I don't have any idea what it does or who it (p.70) does it to.

SENATOR CRAWFORD: Well, if this goes through, maybe I can have Gwen offer it there, if that's --

SENATOR JENNINGS: I would appreciate that opportunity for the staff to look at it, since this is a fairly extensive bill that we're dealing with.

SENATOR CRAWFORD: Right, that is correct. Okay.

CHAIRMAN: Okay. Are you withdrawing the amendment?

SENATOR CRAWFORD: I withdraw the amendment.

CHAIRMAN: Okay, we'll go to --

Okay, the second one is a title? Okay, we have by Senator Kiser, on page 10, between line 7 and 8, insert a lengthy amendment.

SENATOR KISER: (Unintelligible.)

SENATOR JENNINGS: Only for malt beverages. So this is an exclusive territorial agreement for the beer people. Again, it has not been discussed with me.

CHAIRMAN: No one mentioned it to you?

SENATOR JENNINGS: Tomorrow's another (p.71) day. It's whatever you all --

SENATOR KISER: (Unintelligible.)

SENATOR JENNINGS: Well, as I said, Mr. Gridly said he tried, I'm not aware of him coming to see me, but, since I handle all these, I'm surprised that this is where they come. I know there is a disagreement about this within the industry.

We may be in a posture, members of the Committee, and I don't mean to put you into this. Liquor bills in the House have been essentially killed, because of a number of perhaps these very same amendments being offered or going on one and then they turned around and killed the bills back and forth. You know, it's the will of the Committee, but my staff that handles this and I am unaware of all these amendments. So, that Committee that deals with this every day has not had the privilege of looking at it and I don't appreciate that.

UNIDENTIFIED SPEAKER: (Unintelligible)

CHAIRMAN: Have you seen any of these amendments?

SENATOR JENNINGS: None.

(p.72)

STAFF DIRECTOR: Number 7 she may have seen.

CHAIRMAN: Okay, you didn't see 7? The staff director informs me that you might have that waved in front of you there.

SENATOR JENNINGS: Is that the import licenses, as a result of the Supreme Court decision? I'm aware of it and if we bring it up, we'll probably have about half of this crowd for it and half of it against it.

CHAIRMAN: Is that the one about the local, about people, domestics getting a little bit of help?

SENATOR CRAWFORD: Yeah, listen. I'd like to bring that. I talked to Senator (p.73) Jennings about that. I don't think that half of this crowd is going to be against that.

CHAIRMAN: I don't either.

SENATOR CRAWFORD: We'll see who our friends are out there.

CHAIRMAN: Amendment 7 on page 10 between lines 7 and 8, insert a lengthy amendment. Senator Crawford, explain.

SENATOR CRAWFORD: Thank you, Mr. Chairman. I mentioned this to Senator Jennings on the floor, I think, before and I hope that everybody got her the language.

What this bill does, for the last 27 years there has been an incentive that the State of Florida has had for companies to use certain agriculture products and for distilleries in Florida. As a result of that, we have about 300 jobs in Polk County that were produced by that tax incentive. A few years ago we had trouble in the courts with that incentive and so we rewrote it, had a big discussion about it, came back, thought we had it worked out with the courts, went back into the courts again. Supreme Court struck it, after actually we had come here to session so it kind of got thrown on us right in the middle of the session.

At the same time, the State of Georgia had another differential tax and they had the same problem as we did. So they actually had their tax challenged, it was upheld, and I think cert was denied to the Supreme Court so we think we have now the right way of delivering this tax and this bill would then rewrite that tax so that (p.74) distilleries in Florida do have a small preference over out-of-state and this is an attempt to make that law constitutional.

SENATOR JENNINGS: Mr. Chairman, the Department is here. This has a negative revenue impact. I think perhaps they should address the issue.

CHAIRMAN: Well, they don't have a card up here and I don't see them standing up. This guy is not exactly rushing to the forefront.

SENATOR JENNINGS: Mr. Chairman, this is what you call a command performance. They'll stand up in a minute here.

SENATOR CRAWFORD: As he's coming up here, let me say, I met with Secretary Poole before we came in here today and I think that--I didn't find any opposition from the Secretary. I'm not sure what his--some of the times I don't know what the troops are doing here.

CHAIRMAN: Yes, sir, could you state your name and your position, and please fill out a card and bring it up here when you're through.

(p.75)

MR. COCHRAN: Yes, I'm John Cochran. I'm the Budget Officer of the Department of Business Regulation. As a part of my duties with the Department, I make revenue projections. We've been asked to look at the possible revenue impacts of this particular amendment on this date.

We looked at it from a standpoint first assuming constitutionality of the amendment. Based upon that, the impact would be about \$3.4 million to the State out of general revenue. That does not compare unfavorably with the current law which was stricken recently by Supreme Court. It's about the same amount of money assuming constitutionality.

If the bill is not unconstitutional, even though I understand that there is a reverse severability clause in there, it does put a good bit of the state revenue at risk. It puts revenue at risk because it lowers the base on the beverage tax. By lowering the base, then the difference between the current base and the old base is about, excuse me, the difference in the base that's considered in the amendment and the current base is (p.76) about \$111 million per year so if the additional

import tax was stricken down, there would be this difference between the base.

CHAIRMAN: Just a question. I know on the insurance, the domestics vs. the out-of-state, when something is struck down they usually don't go back, unless you've shown ill will and the ruling has been and so there really wouldn't be any loss. You'd just have to change your law as soon as the ruling would come out or within a period. Isn't that correct?

MR. COCHRAN: Yes, sir, that could be correct. As I understand---

CHAIRMAN: I want everybody to be clear on that and to know exactly what the norm is.

MR. COCHRAN: As I understand, it would be up to the courts. Twice before the courts have addressed this situation, twice they found it unconstitutional and in each case they did not require the state to make refunds. They may in this particular case, because in this particular case it's the (p.77) difference that the base has been changed.

CHAIRMAN: So, generally speaking, they don't force you to refund. As long as you're moving forward and showing intent to correct what is perceived to be a constitutional problem. Okay.

Is there any further questions of our testifier? Thank you very much.

Is there anyone else that wishes to speak to the amendment?

SENATOR JENNINGS: Mr. Chairman and Senator Crawford, this issue was taken up and discussed prior to the bill actually being brought before the Committee and it was our determination, you know, we had a concern based on the Department, but obviously the will of the Committee prevails.

CHAIRMAN: Okay. Is there any further discussion on the amendment? Okay, is there any objection to the amendment? Show the amendment passing unanimously without objection.

(p.78)

EXCERPT FROM SENATE APPROPRIATIONS COMMITTEE
HEARING
MAY 27, 1988

(CS/SB 1326, including Senator Crawford's amendment relating to excise and import taxes, is being discussed. The following is the only discussion related to the excise and import taxes.)

(p.79)

CHAIRMAN: We are going to go back to Senate Bill 1326 that we temporarily passed. Senator Jennings' Commerce Committee Bill.

Are you ready, Senator?

SENATOR JENNINGS: As ready as I'll ever be. Is this the liquor bill? 1326?

CHAIRMAN: Right, we're all going to need some.

SENATOR JENNINGS: Okay. If I get this one handled real fast, can I have my other two at the same time?

Mr. Chairman, Senators, the alcoholic beverage bill you have before us in essence is some technical amendments to the Department's statutes that they have to abide by dealing with quota drawings and

how long the establishment must be open to qualify for the license and what happens if the person holding the license has a debilitating illness and very technical things. There is one amendment that's with it that came from Finance and Tax that deals with--

CHAIRMAN: Page 175, excuse me, Senator, in the green book.

SENATOR JENNINGS: --that deals with a (p.80) constitutional issue of favored status on imports that use Florida products, like citrus or sugarcane or, I don't know, leftover palm tree or something like that.

CHAIRMAN: Elderberry.

SENATOR JENNINGS: Elderberry. Senator Margolis has a couple of amendments that I will be glad to take up. Then there's one that we're not too pleased with.

CHAIRMAN: Okay, Senator Margolis.

SENATOR MARGOLIS: There are three technical amendments.

CHAIRMAN: We are calling these "amendments to the amendment."

SENATOR JENNINGS: Well, Mr. Chairman, the amendment from Finance and Tax, it was not enrolled into another committee sub so they are amending the Finance and Tax amendment that is traveling with the bill and these are---

CHAIRMAN: Okay. Amendment to amendment No. 1, page 2, line 5, insert after the word wine "and malt beverages."

SENATOR MARGOLIS: Senator, all three of these amendments are technical amendments (p.81) to---people reviewed the amendments and Senator Crawford requested that I submit them. He's sitting here.

SENATOR JENNINGS: Yes. Senator Crawford is our troublemaker today.

CHAIRMAN: I appreciate that.

SENATOR JENNINGS: Members of the Committee, just so you know, these are technical to the amendment, but amendment No. 1 deals with the favored status on imported goods that use Florida products and it is a constitutional issue. We are adding an amendment that we hope will perfect something, but should this be struck down by the courts again, this could cost us in the neighborhood of \$110 million.

I knew that would get your attention.

CHAIRMAN: Three technical amendments (unintelligible).

Another amendment to amendment No. 1 which inserts the statement that in the event a court determines this to be unconstitutional that the amendments are added here.

SENATOR JENNINGS: Aren't here and we (p.82) don't lose \$110 million.

CHAIRMAN: (Unintelligible). I forget the name. What's that called? That clause? Severability.

SENATOR JENNINGS: Severability.

CHAIRMAN: Severability. All right.

SENATOR JENNINGS: Senator Margolis probably has another one.

SENATOR MARGOLIS: I have one amendment that doesn't go to the amendment, it goes to the body of the bill.

SENATOR JENNINGS: Yes.

SENATOR MARGOLIS: And it deals with liquor licenses in hotels that have converted to condominiums and since they're not, as long as the hotel rooms or 50 condominiums are used as hotel rooms, the condominiums are used as hotel rooms, they can retain their liquor license.

CHAIRMAN: All right. That is proposed, Committee, proposed amendment A that's offered by Senator Margolis, condominium guests. Any questions on that amendment? Any objections? Show the amendment adopted.

SENATOR JENNINGS: It does--- Senator (p.83) Langley, were you concerned about this? It's all right. The Department has looked at it. We have a situation where they want--for selling of alcoholic beverages, we're defining arena the same as a civic center so that they have to meet certain things. And there is another provision that--we have some conversions in South Florida of former hotels that had restaurants. They're not condos, but the restaurants are still there, and we don't want them to lose their liquor license because they are still operating as restaurants. The Department has looked at them and they agree that we need to do it by law. They can't just adopt a rule for it.

CHAIRMAN: Okay, Senator (unintelligible) amendment to amendment one by Senator Jennings.

SENATOR JENNINGS: Okay. We're going to withdraw those. That just takes out everything that we just put in.

CHAIRMAN: You don't need that.

SENATOR JENNINGS: Not yet.

CHAIRMAN: Title amendment, if we need these title amendments (unintelligible).(p.84) All right.

SENATOR JENNINGS: Okay, I think Senator Kirkpatrick has an amendment.

CHAIRMAN: Now, if the intent --- If it's a Committee substitute we need to adopt the Senate tax amendment.

SENATOR JENNINGS: Okay, well, let's go ahead and ---

CHAIRMAN: Without objection as amended we will adopt the Finance and Tax Amendment. And now we have an amendment by Senator Kirkpatrick.

SENATOR KIRKPATRICK: Which one do you want first?

CHAIRMAN: Okay, on page 10, line 8, strike all said lines and insert lengthy amendment. Mr. Kirkpatrick?

SENATOR KIRKPATRICK: Yes, Mr. Chairman. This basically is the territory amendment, and all it says that if you give somebody an exclusive territory and franchise or give the franchise an exclusive territory, then we're going to protect that exclusive territory, and I just have a couple of reasons why I think this is real important. (p.85) Basically, I think that the small business people in this state that sell beer need to be protected in their opportunity to have access to distribution of the product at a fair price. That needs to be protected, and I think that if we don't have this, we'll wind up with a situation where distributors can come into another distributor's territory and he can cherry pick out the high volume outfits.

You can cut a deal with the national headquarters or the state headquarters or some corporation and handle it and wherever you go and eventually the small guy gets left with no real access to it, and I think it initially might make the price a little more competitive but in the long run these other folks will go out of business and you'll wind up

with just one person controlling all of the sales, which I think will be detrimental.

CHAIRMAN: Senators, we have to speed this up. Senators, if nobody calls point of order we will go overtime and try to get to some of these bills ---

SENATOR KIRKPATRICK: I just want it voted up.

(p.86)

CHAIRMAN: Buddy Grisby, do you want to say anything? Are you against it or for it?

GRISBY: I'm for it. (Unintelligible).

SENATOR JENNINGS: Mr. Chairman, I respectfully oppose the amendment and I would ask that the Committee oppose the amendment. This is a separate kind of issue, as I mentioned. This Department bill has suddenly become the alcoholic beverage train which from time to time we find, but this particular amendment is going to cause us a whole lot of trouble at some future juncture, and I would ask that you oppose it.

CHAIRMAN: Okay, if you favor the amendment, say aye.

GROUP: Aye.

CHAIRMAN: Opposed?

SENATOR JENNINGS: No.

CHAIRMAN: Amendment passes. Title amendment without objection. Okay. Senator Jennings moves the bill with the amendment, all in favor, say aye.

GROUP: Aye.

CHAIRMAN: Opposed. So the bill is reported favorably.

(p.87)

EXCERPT FROM SENATE SESSION
June 3, 1988

(CS/SB 1326 including Senator Crawford's amendment relating to excise and import taxes is being considered by the Senate. The following is the only discussion related to the excise and import taxes.)

(p.88)

PRESIDENT: Now, is there further discussion on the bill? If not, Senator Jennings moves that Committee Substitute for Senate Bill 1326 be read a third time by title only and placed on final passage. Show the motion adopted without objection. Read the bill.

CLERK: Committee Substitute for Senate Bill 1326, a bill to be entitled an act relating to the Beverage Law.

PRESIDENT: Any questions?

SENATOR JENNINGS: Mr. President, just so that the Senate doesn't think we're trying to pull anything over on them, the first Finance and Tax Amendment was a rewrite dealing with the use of Florida products in export goods in wine and spirits and it is somewhat controversial.

I don't want anyone to think that we ran it through here without them knowing about it. There has been a lot of discussion. I don't hear any comments on the floor, but I don't want it to ever be said that I didn't tell you.

PRESIDENT: Any questions? If not, (p.89) the Clerk will unlock the machine and the Senators will vote on the final passage of Committee Substitute for Senate Bill 1326. Have all Senators voted? The Clerk will lock the machine and announce the vote.

CLERK: 30 yeas, 3 nays, Mr. President.

PRESIDENT: So the bill passes.

(p. 90)

EXCERPT FROM SENATE SESSION
June 7, 1988

(Senate is voting upon CS/SB 1326 as amended and approved by the House of Representatives.)

(p.91)

PRESIDENT: Okay, Senator Barron.

SENATOR BARRON: Message from the House. 1326.

PRESIDENT: Okay, read the first message from the House.

CLERK: Mr. President, I am directed to inform the Senate that the House of Representatives has passed with amendments Committee Substitute for Senate Bill 1326 and request the concurrence of the Senate.

SENATOR JENNINGS: Mr. President and Senators, is this the alcoholic beverage bill?

PRESIDENT: Senator Jennings.

SENATOR JENNINGS: There are a whole bunch of amendments and I move we concur in all of them. They're awful, but we concur.

PRESIDENT: Any questions of Senator Jennings on the ---

SENATOR JENNINGS: This is the alcoholic beverage bill that we sent down. There are a number of amendments dealing with the Jacquin issue. There are a number of amendments dealing with the exclusive territorial franchise for beer. There is also an amendment to delete the tax on imported beer. There is (p.92) an amendment dealing with cigarettes. There are lot [sic] of just real juicy things. But it is a bill that is of great concern to Senator Crawford, and so I move you say that we concur in all the House amendments.

PRESIDENT: Any questions on the amendments? Any objections? No objections. Show the Senate does concur in the House amendments and the question recurs on the final passage. Committee Substitute Senate Bill 1326. Clerk will unlock the machine and Senators proceed to vote. Lock the machine and announce the vote.

CLERK: 26 yeas, 3 nays, Mr. President.

PRESIDENT: So the bill passes.

IN THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 88-2881

(Caption omitted in printing)

FINAL JUDGMENT

This matter having come on for trial to the Court, without jury, on November 29, 1988 and the Court having heard the evidence and the arguments of counsel and being duly advised in the premises, it is hereby ORDERED, ADJUDGED and DECREED:

1. For the reasons set forth in the transcript of proceedings on November 29, 1988, attached hereto and incorporated by reference herein, the provisions of Section 10(1) of Chapter 88-308, Laws of Florida, amending §564.06, Florida Statutes; and the provisions of Section 11(1) of Chapter 88-308, Laws of Florida, amending §565.12, Florida Statutes, are hereby declared to be in contravention of Article I, Section 8, clause 3 of the Constitution of the United States (the Commerce Clause) and to be therefore null, void, and of no effect.

2. This judgment shall operate prospectively from the date of rendition.

DONE AND ORDERED at Tallahassee, Leon County, Florida this 30th day of November, 1988.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies to all counsel of record

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

GENERAL JURISDICTION NO. 88-2881

(Caption omitted in printing)

EXCERPT OF PROCEEDINGS - RULING OF THE COURT

The above-entitled matter came on to be heard before the Honorable CHARLES E. MINER, Circuit Judge, Leon County Courthouse, Tallahassee, Florida, on the 29th day of November, 1988, commencing at 1:30 p.m.

Reported by:

JERRY L. ROTRUCK

Certificate of Merit

APPEARANCES

JAMES L. ARMSTRONG, SAMUEL C. ULLMAN, BETH ANN O'NEILL, JANE McMILLAN, and WILLIAM GOLDEN, Attorneys at Law, of the law firm Kelley, Drye and Warren, including Smathers & Thompson, 2400 Miami Center, 100 Chopin Plaza, Miami, Florida 33131; appeared on behalf of the Plaintiffs.

DANIEL C. BROWN and J. C. O'STEEN, Assistant Attorneys General, State of Florida Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301; appeared on behalf of the Defendants.

MARGUERITE DAVIS, GARY RUTLEDGE AND PAUL R. EZATOFF, JR. Attorneys at Law, of the law firm Katz, Kutter, Haigler, Alderman, Eaton & Davis, 800 Barnett Bank Building, 315 South Calhoun Street, Tallahassee, Florida 32301; and

BRUCE G. ROGOW, Attorney at Law, 2097 Southwest 27th Terrace, Fort Lauderdale, Florida 33312; appeared on behalf of the Intervenor Jacquin and Todd[sic] Hunter.

JENNIFER PARKER LaVIA, Attorney at Law, of the law firm Parker, Skelding, McVoy & Labasky, 318 North Monroe Street, Tallahassee, Florida 32301; appeared on behalf of the Intervenor California Wine Institute and Tampa Wholesale Liquors.

APPEARANCES (continued)

THOMAS F. CONNELL, Attorney at Law, of the law firm Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington D.C. 20037-1420, appeared on behalf of the Intervenor California Wine Institute.

ALSO APPEARING:

STEVEN NACLARIO, Senior Vice President, Bacardi Imports, Inc., 2100 Biscayne Boulevard, Miami, Florida 33137.

(p.1)

EXCERPT OF PROCEEDINGS

THE COURT: This case is not going to turn on any answers, any questions asked in deposition or any answers to those questions.

I am going to rule at this time. I have carefully considered this matter, I have read all of the matters that you have submitted to me. I don't think there is any question in my, well, there is no question in my mind in a constitutional sense that this statute is but a warmed-over version, dressed up in different clothing perhaps, of that which has previously been, at least on one occasion, struck down as violative of the commerce clause. I think that the same thing is true.

Now, I do not find that legitimate 21st Amendment concerns of the State of Florida as expressed in the purposes paragraph justify in a constitutional sense overriding the commerce clause. I think that no matter what it is called, I think we have got to look, and that is why we built a record in this case, I think we have got to call it like it is. The State has not justified this statute, justified this cost differential which I believe to be clearly discriminatory on 21st Amendment concerns.

The State, number one, has never even, how could (p.2) it, for instance, I might look at it, at this case a good deal differently if the State did have an inspection program, quality control to protect its citizens. The State didn't have any quality control program as that, they never have prior to now. They do not now inspect any property upon which grain or other vegetables are grown that are used in the distilling process. I think that all of that is just illusory.

I impute and suggest no bad motives to anybody, on the Legislature or any other branch of government, but just simply can't see the 21st Amendment purposes that would save that which is so clearly discriminatory.

Now, I am going to look with great interest and follow with great interest the Supreme Court granting certiorari in the two Connecticut cases, but I just think this is a bit more of the same. I think this is, for, however well intentioned, and I impute, again, to Senator Crawford and other members of the Legislature who passed this bill, no base motives.

I simply suggest that they drew and drew some comfort out of a Georgia statute, I don't know how hotly contested it was, how it was advocated and how it was lawyered, but I suspect that the purposes section of the statute here in question is drawn directly from the purposes section in the Georgia statute, which the Georgia (p.3) Supreme Court found to be constitutional.

I don't know how hard the matters there were argue [sic] and how detailed the court analysis was there, but as far as I am concerned, the Legislature still has yet to succeed in, as one of their purposes, giving some relief to some of our Florida growers, Florida distillers. I think that is simply what this is, pure and simple, and that is going to be my ruling in the matter, and I announce it from the bench solely for the purpose of letting you go forward to whatever court you care to hear this.

I do it, again, because I am not going to have time to write any lengthy opinion expressing my views and I knew that at the time that I asked you to build a record. You have built a record, and now the matter will have to go forward to one of the appellate courts, but I do find that the statute is violative of the commerce clause of the Constitution of the United States.

Now, with respect to prospective or retrospective application, I am going to stay with the position that [sic] have taken, briefly, and I am going to find that my ruling is going to be prospective in its application and not retrospective, that is to say, all monies collected and I am not going to order their return.

(p.4)

McKesson also involved the question of prospectivity and retrospectivity, did it not?

MR. BROWN: I am sorry, Your Honor?

THE COURT: McKesson, the Crown, one of those cases involved --

MR. BROWN: Yes, sir.

MR. ARMSTRONG: Yes, it did, Your Honor.

THE COURT: It was McKesson, too.

MR. BROWN: Both of them, actually.

THE COURT: Both of them did, and I have ruled that in that case that there should only be prospective application, and the Supreme Court at least has agreed with me.

Now, the United States Supreme Court, I am told, has granted cert on the matter, but I am going to find that there will be no taxes refunded, and let me give you my primary reason for that.

By now, all of the persons who have had to pay this tax have passed that tax on to the consumers. I don't think there is any out-of-pocket expense to anybody, so the people of Florida have paid it back, and if you can show me some way to get it back from those citizens or to pay them, and if I take this money and make it -- require the State to refund it, if you will refund it to the people who bought it, I will do it, but I am not (p.5) going to put it back in the coffers of the companies that paid it.

Therefore, my ruling is prospective only in its application, it is not retrospective.

The statute I find to be unconstitutional as violative of the commerce clause, and I find that the 21st Amendment arguments are not available, I do not find any 21st amendment justification provided in the commerce clause.

That is it, ladies and gentlemen. I want to thank everybody. I know that I put you through a rather tough time schedule, and I did it not because I had any knowledge of where I would be -- that I was going to be leaving this court, but because I was going on the criminal bench and would not be able to hear it, this is the only time I could hear it, and I want to thank everybody, Mr. Armstrong, you and your associates, and certainly Dan Brown who I will have to observe is one of the best lawyers, he is certainly one of the most persistent ones that I have run into in the time that I have been on the circuit bench, and it is great as always to see my esteemed friend, Bruce Rogow. One of these days I am going to agree with Bruce on something and it also going(sic) to either surprise me to death or him to death.

MR. ROGOW: Maybe in the DCA, Judge.

MR. ARMSTRONG: Your Honor, should we prepare and submit an order?

THE COURT: You can prepare a short order and I want it short, it need not be more than a page in length, and read it to Mr. Brown --

MR. ARMSTRONG: Yes, sir.

THE COURT: --before you submit it to me. Get it to me within the next three or four days because I will not be in my office after the 4th or 5th.

MR. ARMSTRONG: Do I understand, then, that the Division should be governed accordingly, Your Honor, by the ruling as of today?

THE COURT: That is correct, that statute is unconstitutional as we speak. Yes, Dan?

MR. BROWN: Your Honor, if I might suggest, technically, if that is to be the Court's ruling, what we ought to do is transcribe the Court's findings and file with the Court your order so that tomorrow morning this could be rendered as the effective date.

THE COURT: You speak with the court reporter about that.

All right, citizens, thank you.

MR. ARMSTRONG: Your Honor, we have some things we would like to get in, I think we can get them taken care (p.6) of in your absence, memoranda and things of that sort. I know Your Honor is tired and you don't want to --

THE COURT: Yes.

MR. ARMSTRONG: We have some things to complete the record that we would like.

THE COURT: You can complete the record but make certain you complete it with everybody's acknowledgement that is part of the record.

MR. ARMSTRONG: Thank you, Your Honor.

THE COURT: I don't want to leave this file here, but we must do something to protect this file. I am

going to let you take care of it. I trust you implicitly.

MS. DAVIS: Thank you.

(Whereupon, the proceedings were concluded at 7:40 p.m.)

(Reporter's certificate omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 88-2881
FL BAR NO: 0191049

(Caption omitted in printing)

JOINT NOTICE OF APPEAL

NOTICE IS GIVEN that C. LEONARD IVEY, Defendant, Appellant, in his official capacity as Director of the Division of Alcoholic Beverages and Tobacco of the State of Florida, Department of Business Regulation, JACQUIN-FLORIDA DISTILLING CO., INC., and TODHUNTER INTERNATIONAL, INC., Defendants, Appellants, appeal to the First District Court of Appeals, the Order of

this Court rendered December 1, 1988. The nature of the order is a final order granting injunctive relief.

s/s Daniel C. Brown
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QUESTIONS PRESENTED

1. Whether the Constitution or federal law requires state courts—having remedied constitutional flaws in a state tax statute by striking certain impermissible preferences—to give the benefit of those preferences for past years to all taxpayers who did not receive them.

2. Whether the Eleventh Amendment bars this Court from ordering state officials to make tax refunds from the state treasury.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-192

MCKESSON CORPORATION,

v. *Petitioner,*

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR RESPONDENTS

STATEMENT

This case involves a challenge to a Florida statute that granted tax preferences for alcoholic beverages made from specified citrus, grape, and sugarcane products. The state trial court held that the preferences violated the Commerce Clause and, by way of remedy, struck them from the statute. The Florida Supreme Court affirmed both the decision on the merits and the particular remedy; it declined to extend the preferences to petitioner and, thus, denied its claim to have any prior taxes refunded. It is that denial to which petitioner now objects.

The State of Florida has long derived a substantial portion of its revenues from a tax on alcoholic beverages. From the 1950's until 1985, the State imposed a

broad-based tax on manufacturers and distributors of alcoholic beverages within the State. *See, e.g.*, Fla. Stat. §§ 564.06, 565.12 (Supp. 1984); §§ 564.06, 565.12 (Supp. 1972). The statutes, however, contained special exemptions and reductions from the generally-applicable tax for products made in Florida. Fla. Stat. §§ 564.06, 565.12 (Supp. 1984); §§ 564.06, 565.12 (Supp. 1972). After this Court held that a similar exemption scheme in Hawaii violated the Commerce Clause, *see Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Florida Legislature promptly amended sections 564.06 and 565.12 and passed the statutory provisions at issue in this litigation. 1985 Fla. Laws Ch. 85-203, 85-204; Fla. Stat. §§ 564.06, 565.12 (1985). The new provisions, which became effective on July 1, 1985, contained exemptions and reductions for enumerated citrus, grape, and sugarcane products. Although the products are found in Florida, they are found in other states and countries as well, and the new provisions were not limited to Florida-based products.

The 1985 tax scheme, while complicated in detail, is relatively simple in outline. First, the statute divides alcoholic beverages into five categories: low-alcohol beverages; medium-alcohol wines; natural sparkling wines; medium-alcohol liquors; and heavy-alcohol liquors. Next, the statute provides for a flat tax on each gallon of product sold, with the rate varying from \$2.25/gallon to \$9.53/gallon depending on the particular product.¹ Finally,

¹ The 1985 statute established the following tax rates for alcoholic beverages:

Product	Tax Rate
1. low-alcohol beverages (1%-14% alcohol, excluding natural sparkling wines and malt beverages)	\$2.25 per gallon (see § 564.06(1))
2. medium-alcohol wines (wines with more than 14% alcohol, excluding natural sparkling wines)	\$3.00 per gallon (see § 564.06(3))
3. natural sparkling wines	\$3.50 per gallon (see § 564.06(4))

[Continued]

the statute establishes a series of exemptions and preferences, ranging from exemptions for sacramental wine and beverages on federal bases, Fla. Stat. §§ 564.06(5), 564.06(8), 565.12(4) (1985), to preferences for products made from specified citrus and grape products and, for liquors, from specified sugarcane products as well. Fla. Stat. §§ 564.06(2), 564.06(3), 564.06(4), 565.12(1)(b), 565.12(2)(b) (1985).

The tax on so-called "preferred products" is not measured by a flat rate but according to a formula or sliding scale, depending on the particular product. To determine the tax per gallon for a given month, the state Department of Business Regulation totals together all sales in the relevant category for the prior month—that is, sales of all distributors—and then selects the proper rate from the applicable formula or sliding scale.² The

² [Continued]

4. medium-alcohol liquors (beverages, except wines, with 14%-48% alcohol) \$6.50 per gallon
(see § 565.12(1)(a))
5. heavy-alcohol liquors (beverages, except wines, with more than 48% alcohol) \$9.53 per gallon
(see § 565.12(2)(a))

² For example, the tax on medium-alcohol wines in the 1985 statute would be calculated as follows:

Sales in prior month	Tax rate (see § 564.06(10)(c))
less than 12,500 gallons	\$1.50 per gallon
more than 12,500 gallons	\$3.00 per gallon (same as the flat rate)

The tax on natural sparkling wines would be calculated according to a different scale:

Sales in prior month	Tax rate (see § 564.06(10)(d))
0-2,000 gallons	\$1.50 per gallon
2,001-4,000 gallons	\$2.00 per gallon
4,001-6,000 gallons	\$2.50 per gallon
6,001-8,000 gallons	\$3.00 per gallon
more than 8,000 gallons	\$3.50 per gallon (same as the flat rate)

[Continued]

higher the sales, the higher is the tax. If a certain level of sales is reached for any category of preferred product, the tax for that product is set at the same flat rate paid for sales of other products in that category.³

The tax is paid in almost all cases by distributors, of which petitioner is one. Under Florida law, manufacturers may not sell directly to retail dealers, and distributors thus serve as necessary intermediaries.⁴ It is a matter of choice for distributors whether they will sell preferred products, non-preferred products, or both. According to state estimates, the overwhelming majority of sales by volume—approximately 97.5 percent—is of non-preferred products. Likewise, the overwhelming bulk of tax dollars derived from the alcoholic beverages—approximately 98 percent—is from sales of non-preferred products. In fiscal 1985-86 alone, the excise tax on wine and liquor totalled close to \$250 million.

In September, 1986, more than 14 months after the 1985 Act took effect, petitioner filed suit in state court against the Division of Alcoholic Beverages and Tobacco and the Office of the Comptroller. Raising a range of state and federal claims, petitioner sought both injunc-

² [Continued]

See also Fla. Stat. §§ 564.06(10)(a), 565.12(6) (1985).

In July and August of each year, the preferences for most products are inapplicable, and all products in the same category are taxed at the flat rate. Fla. Stat. §§ 564.06(10)(a), 564.06(10)(c), 564.06(10)(d), 565.12(5) (1985).

³ The exemptions and reductions carry accompanying "take-back" provisions: they do not apply to alcoholic beverages manufactured in jurisdictions that utilized discriminatory taxes, agricultural price supports, or export subsidies to benefit locally-produced alcoholic beverages. Fla. Stat. §§ 564.06(9); 565.12(1)(c); 565.12(2)(c) (1985).

⁴ Florida law divides traffic in alcoholic beverages into three tiers, each of which requires a license: (1) manufacture or importation; (2) wholesale distribution; and (3) retail sales. Fla. Stat. § 561.14 (1985). Distributors are required to forward the excise tax to the State. Fla. Stat. §§ 561.50, 561.506, 565.13 (1985).

tive relief and "a refund of alcoholic beverage taxes" from the State for the implementation of the new, post-*Bacchus* tax structure. Joint Appendix ("J.A.") 1-10.⁵ In particular, petitioner challenged what it alleged to be impermissible discrimination in the tax.⁶

The Florida trial court granted petitioner's motion for partial summary judgment, invalidating the exemptions and reductions for specified products. J.A. 261-63. The court specifically found that the 1985 "amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision." J.A. 262-63. The court concluded, however, that the "legislation failed to surmount the constitutional violations addressed in *Bacchus*." *Id.* at 263. To correct the constitutional fault, the court enjoined enforcement of the exemptions and reductions, including their accompanying "take-back" provisions; it thus made all distributors subject to the generally-applicable tax on the five categories, except for the religious use and federal base exemptions. *Ibid.* The trial court also announced that the decision would apply "prospectively." *Ibid.*

The Florida Supreme Court affirmed the trial court in all respects. J.A. 414-30, 524 So.2d 1000 (Fla. 1988). In an extended analysis, the Florida Supreme Court agreed that the 1985 tax exemptions and reductions violated the

⁵ In its complaint, petitioner requested a refund of all the taxes that it had paid under the Florida tax statute. J.A. 10. By the time the case had reached the Florida Supreme Court, petitioner sought the "difference between the disfavored product's tax rate and the favored product's tax rate." J.A. 430. It has reiterated that claim in this Court. Pet. Br. at 48.

⁶ Petitioner did not challenge the State's authority, absent the discriminatory provisions, to impose the tax at issue. It did not, for instance, claim that it lacked sufficient nexus to the State to justify imposition of a tax, or that the tax itself was somehow inherently beyond the State's jurisdiction.

Commerce Clause because they placed "a clear discriminatory burden on interstate commerce which the state has failed to justify in terms of legitimate local benefits other than the admitted benefits to local industry flowing from the statute." J.A. 422. The Florida court noted that the State could have legitimately served its interest in promoting local industry through alternative means, but held that the use of unequal taxes was impermissible.⁷

The Florida court also affirmed the judgment that the finding of unconstitutionality would operate prospectively, thereby granting injunctive relief and striking down the tax exemptions and reductions, but not allowing a refund of the taxes paid by petitioner. It found that the prospective nature of the rulings below was proper in light of the equitable considerations in this case. J.A. 430 (citing *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973)). The court noted that "the tax preference scheme [was] implemented . . . in good faith reliance on a presumptively valid statute," and further pointed out that "if given a refund, [petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." J.A. 430.⁸

⁷ The Florida Supreme Court noted the existence of permissible means such as property tax relief to Florida manufacturers or growers, direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for alcoholic beverages made from Florida crops. J.A. 428-29.

⁸ Following this decision in May 1988, the Florida legislature enacted a new tax that placed a uniform tax on sales of alcoholic beverages but imposed a tax directly on the importation of alcoholic beverages into the State. 1988 Fla. Laws Ch. 88-308. See *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding tax on imported alcoholic beverages); *Heublein, Inc. v. Georgia*, 351 S.E.2d 190 (Ga.), appeal dismissed, 107 S.Ct. 3253 (1987). Petitioner did not challenge this new tax. Another litigant did so, however, and obtained an injunction against its enforcement. *Bacardi Imports, Inc. v. Ivey*, 88-2381 (Second Judicial Cir-

INTRODUCTION AND SUMMARY OF ARGUMENT

The claim made by petitioner—ostensibly one of a "retroactive" right to tax preferences—is not quite what it seems. The Florida courts, while agreeing that the State had improperly imposed unequal taxation, chose to end the inequality by striking the offending preferences from the statute. This solution was obviously compelled by the overall purpose of the legislation, given that the preferences were but a small part of a comprehensive taxing scheme, and it is not challenged by petitioner here. What petitioner wants, instead, is for this Court to mandate different relief for the past than for the future: in short, to extend to it, on a "retroactive" basis, the very preferences that the Florida courts eliminated.

This demand suffers from several serious shortcomings. First of all, it is clear that petitioner has no federal right to state tax preferences, even though the preferences temporarily resulted in a condition of inequality. This Court has frequently held that the flaw of an under-inclusive statute, like the one here, may be cured either by extending the benefit (as petitioner wants) or by withdrawing it (as the Florida courts decided to do). See, e.g., *Heckler v. Mathews*, 465 U.S. 728 (1984); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). It would be perverse to have a rule that, whenever a state court decides to withdraw the benefit for the future, it must also order its recapture from all prior recipients or else provide the benefit after-the-fact to everyone not receiving it. Here, having weighed the "equitable considerations," including the likelihood that petitioner simply passed on the tax, the state courts

cuit of Florida, Nov. 30, 1988), appeal pending, Case No. 73,424 (Florida Supreme Court). Pursuant to that injunction—and a reverter clause in the new statute—sales are once again taxed at the various flat rates provided in the 1985 statute. 1988 Fla. Laws Ch. 88-308, Section 12.

acted well within the bounds of their authority in concluding that injunctive relief was a sufficient remedy.

There is also no right to a refund lurking in the "retroactivity" principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Here, unlike the situation in *Chevron*, the Florida Supreme Court did not hold that its decision striking down the statutory preferences would be inapplicable to petitioner; it simply held that application of the decision did not free petitioner from any tax liability. Indeed, had petitioner sought and obtained its injunction on the day before the statute took effect, the order would have made no difference to its tax bill: then, as afterwards, it would have paid at the generally-applicable rate. Furthermore, even if the analysis in *Chevron* were strictly followed, a weighing of the relevant factors—in particular, the potential impact on the state treasury of providing a "windfall" to petitioner and other distributors—would strongly support the decision not to extend a tax refund. Finally, it seems that petitioner would not be entitled to a tax refund anyway; the tax owed under the sliding scales applicable to the preferences would likely turn out to be the same as the tax already paid under the flat rates.

We also believe that the Eleventh Amendment would bar this Court from awarding the relief that petitioner seeks. This Court has made clear that, in respect of the immunity embodied in the Eleventh Amendment, federal courts may not grant relief in "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); see *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). That restriction applies to this Court as well as to the lower federal courts. See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (Eleventh Amendment bars suit in this Court). Thus, while this Court can hear claims brought by a State, see *Cohens v. Virginia*, 19

U.S. (6 Wheat.) 264 (1821), or claims for injunctions against state officials, see *Ex Parte Young*, 209 U.S. 123 (1908), or suits against state officers in their individual capacities, *Scheuer v. Rhodes*, 416 U.S. 232 (1974), it cannot order the payment of past obligations from the state treasury. See *State of Louisiana ex rel. New York Guaranty & Indem. Co. v. Steele*, 134 U.S. 230 (1890). That payment is precisely what petitioner is demanding here.

ARGUMENT

Petitioner comes before this Court in an unusual posture. Although it prevailed below on its claim that various Florida tax preferences violated the Commerce Clause, the state courts held that the proper remedy was to eliminate the preferences from the statute. To sustain its claim for a tax refund, therefore, petitioner is forced to argue that, while the preferences are no longer part of the state taxing scheme, it nonetheless has a federal right to claim them for years past. For the reasons discussed below, the argument is wholly unpersuasive.

I. THE STATE COURTS HAVE PROVIDED A CONSTITUTIONALLY-ADEQUATE REMEDY BY STRIKING DOWN THE UNLAWFUL TAX PREFERENCES.

A. Petitioner Has No Federal Right To The Invalidated Tax Preferences.

It is necessary, at the outset, to review briefly the grounds on which petitioner challenged, and the state courts struck down, the taxing provisions at issue in this case. Petitioner did not contend—and certainly no court determined—that the State lacked the power to tax petitioner or, indeed, to tax petitioner in precisely the amount that it did. The claimed defect in the statute was that Florida had included a partial exemption from the general tax for products made from crops commonly grown in the State. In short, the taxing scheme was

"underinclusive" because its provisions did not apply equally to all products.

The proper remedy for an underinclusive statute is not, as petitioner would have it, automatically to extend favored treatment to everyone else. While that choice is a permissible one, it is not one required by the Constitution. As Justice Harlan stated, "[w]here a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result). See also *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979) (applying Justice Harlan's *Welsh* analysis regarding underinclusive statutes); *Orr v. Orr*, 440 U.S. 268, 272 (1979) ("In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties . . .").⁹

The requirement of equal treatment thus is not a one-way street. It does not require—or even presume—that the successful objector receive the benefit that he has been denied. As the Court unanimously stated in *Heckler v. Mathews*, 465 U.S. 728 (1984), "when the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 740 (emphasis in original). The Court further explained: "Consistent with Justice Brandeis' explana-

⁹ Although the underinclusiveness analysis frequently arises in equal protection claims, it is not confined to such claims. See *Welsh v. United States*, 398 U.S. at 362 n.15 (Harlan, J., concurring in result).

tion of the appropriate relief for a denial of equal treatment [in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931)], we have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others." *Id.* at 740 n.8.

The necessary effect of this rule, as this Court has acknowledged, is that even a successful plaintiff may not actually receive the benefits previously given to a favored class. In *Stanton v. Stanton*, 421 U.S. 7 (1975), for instance, a mother seeking additional child support for her daughter successfully challenged a statute setting the age of majority for girls at 18 years and for boys at 21 years; the Court specifically noted, however, that the mother still might not obtain the monetary relief that she sought. Pointing out that the differential could be remedied as effectively by lowering the age for boys as by raising it for girls, the Court stated: "[t]he appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit." *Id.* at 18. Likewise, in *Heckler v. Mathews*, *supra*, the Court observed that a claim for equal treatment and a claim for financial recovery were not one and the same, noting that the Court had "frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." 465 U.S. at 739.¹⁰

¹⁰ See also *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 152-53 (1980) (widower who successfully objected to gender-based difference in conditions for death benefits is not necessarily entitled to benefits that widows had received); *Orr v. Orr*, *supra*, 440 U.S. at 272 (husband who successfully objected to statute requiring only males to pay alimony is not necessarily entitled to benefit of no-alimony obligation).

Although petitioner seems to contend that a different rule must be applied to tax cases (Pet. Br. at 24-32), that theory is simply incorrect. Almost a century ago, this Court stressed a virtual presumption in favor of excising an invalid tax provision and preserving the generally-applicable tax:

Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.

Field v. Clark, 143 U.S. 649, 697 (1892). Forty years later, this Court reiterated that impermissible treatment in a tax provision should not defeat the basic revenue goals and clear legislative purpose of the general statute:

We find no warrant for concluding that the Legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that, if the Legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity.

Utah Power & Light Co. v. Pfof, 286 U.S. 165, 185 (1932).

Several terms ago, the Court made clear that impermissible tax preferences, like other invalid preferences, may be either extended or eliminated. See *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). There, petitioner (a Vietnam veteran) objected to tax exemptions given only to Vietnam veterans who had lived in New Mexico before the time of his arrival. This Court

held that the taxing scheme violated the equal protection clause, but it left the appropriate relief to the state courts. In so doing, it emphasized that it was for those courts to decide, in accordance with the legislative purpose, whether the tax exemption should be extended or invalidated. 472 U.S. at 624.

The gravamen of petitioner's complaint thus must be that the remedy ordered here, while enough to assure equality for the future, does not provide full equality for the past. But this Court has never held that a state court, having withdrawn an improper benefit, is compelled to order its recovery from those having received it or, if it does not, then extend it *post hoc* to everyone denied it. As we have noted, in *Stanton v. Stanton*, *supra*, the Court pointed out that the plaintiff might not gain any additional support for her daughter, with no indication that this result could occur only if all payments to parents of male children were recovered. 421 U.S. at 17-18. Similarly, in *Wengler v. Druggists Mutual Ins. Co.*, *supra*, the Court left it to the state courts to decide "whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows" (446 U.S. at 152); nothing in the opinion suggests that, if the choice were the latter, all prior payments to widows would have to be rescinded unless widowers were given the same payments.¹¹

It would be particularly out-of-place, moreover, to create and enforce an overriding federal right to past benefits in cases, like this one, arising under the Commerce Clause. Although that clause limits state power to regulate and tax interstate commerce, see, e.g., *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333,

¹¹ There may be particular cases in which the denial of past benefits will effectively leave the plaintiff without any relief at all. See, e.g., *Iowa-Des Moines Nat'l Bank v. Bennett*, *supra*. As we discuss below, this is not such a case. See pages 18-19, *infra*.

350 (1977), it does so in favor of the national interest in open trade among the States, not in favor of individual business interests. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-42 (1949); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144-45 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984).¹² The national interest, in most if not all cases, can be adequately served by removing the particular barrier to commerce, without also subjecting the erring State to enormous accrued obligations.

It seems obvious, in fact, that a federal rule mandating back payments would put lawmakers in an impossible position. Virtually all taxing and general welfare statutes place persons in different categories and create exceptions to governing rules. Because it would be impractical in most cases, as well as exceedingly harsh, to retrieve benefits wrongly paid or demand back taxes from exempted individuals, the theory advanced by petitioner would mean, in practical terms, that every invalid exception necessarily became the rule. By such logic, if the courts below had struck down the exemption in the Florida statute for sacramental wine, the State would have no choice but to relieve all distributors of their tax liability for the period of the exemption or demand back taxes for sales of sacramental wine. There is no basis in the Constitution—and particularly none in the Commerce Clause—for requiring so absurd a result.

¹² It is thus plain that Congress, acting pursuant to the power conveyed by the Commerce Clause, can subject individual business interests to regulation that would be beyond the authority of individual states. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981) (“[o]ur decisions do not . . . limit the authority of Congress to regulate commerce among the several States as it sees fit”) (emphasis in original).

The doctrine advocated by petitioner would also have the effect of rewarding plaintiffs who sat on their claims. The gist of its argument is that a plaintiff who successfully challenges a tax preference must be given the benefit of the preference while it was in effect, and thus a refund of taxes paid at the general rate; yet, even petitioner does not dispute that, if the same plaintiff obtained an injunction against the preference *before* it took effect, it would have to pay at the general rate and would be entitled to no refund at all. The same incentive for delay would exist for any claimant seeking a statutory benefit: the longer the time before challenging unequal treatment, the larger the supposed entitlement would become. That result is just the opposite of what a rational rule of law should encourage.

In short, petitioner has no inherent federal right to the relief that it seeks. As we discuss next, the state courts resolved the competing interests in a fair and reasonable manner, and the remedy afforded to petitioner was well within the bounds of its authority.¹³

B. The State Courts Properly Denied Petitioner's Claim For A Refund.

The decision of the state courts to withdraw rather than extend the tax preference at issue here, and the corresponding decision not to provide a tax refund to petitioner, are reasonable and fully consistent with remedial principles. Any other outcome, in fact, would provide petitioner (and others in its position) with an unjustified windfall and have a needlessly severe impact on the state taxing scheme.

When the coverage of state legislation is challenged on constitutional grounds, this Court has recognized that the

¹³ Petitioner makes a policy argument that this Court must recognize a federal right to a refund to prevent state legislatures from repeatedly enacting unconstitutional statutes. We address that argument at pages 29-30, *infra*.

state courts are better able to make the necessary determinations about state legislative intent and proper remedy. Thus, in *Wengler v. Druggists Mutual Ins. Co.*, *supra*, the Court stated: "Because state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying this constitutional violation." 446 U.S. at 152-53. See *Stanton v. Stanton*, *supra*, 421 U.S. at 17-18.¹⁴ The Court has taken the same approach where state taxing provisions were involved. See *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-97 (1983) (remand to state court to determine whether successful litigants are entitled to tax refund); *Hooper v. Bernalillo County Assessor*, 472 U.S. at 624 (1985) ("It is for the New Mexico courts to decide, as a matter of state law, whether the state legislature would have enacted the statute without the invalid portion"); *Williams v. Vermont*, 472 U.S. 12, 28 (1985).

The Florida courts here concluded that the legislature would have wanted the preferences severed from the statute rather than enlarged to cover sales of all products.¹⁵ Even if the question were still an open one, that conclusion would be virtually inescapable. The general

¹⁴ In considering the underinclusiveness of state statutes, this Court has sometimes emphasized deference to the state legislature for the remedial judgment about extension or invalidation. See *Craig v. Boren*, 429 U.S. 190, 210 n.24 (1976).

¹⁵ Although the inquiry arises only because of a finding of unconstitutionality, the proper reach of the statute turns on matters of state law and legislative intent. See *Zobel v. Williams*, 457 U.S. 55, 65 (1982); *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942). Cf. *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part) ("In choosing between these alternatives [of extension or withdrawal], a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole It should not use its remedial powers to circumvent the intent of the legislature").

tax at issue accounts for nearly \$250 million each year in state revenue, while the products covered by the preferences amount to only a tiny portion (less than 3 percent) of the sales subject to tax. See page 4, *supra*. There is absolutely no possibility that the legislature would choose to have all products taxed at a preferential rate, if the possible effect would be to reduce state revenues by hundreds of millions of dollars annually. The legislature, in fact, has said as much: a reverter clause in the 1988 statute provides that, in the event that the statute is held unconstitutional, all products shall be taxed under the 1985 statute as construed by the Florida Supreme Court in this case. 1988 Fla. Laws Ch. 88-308, Section 12.¹⁶

The decision not to extend the preferences, or to give petitioner the benefit of them for past years, is also strongly supported by the "equitable considerations" emphasized by the Florida court. J.A. 430. Indeed, measured by principles of equity, petitioner's claim for a refund is uncommonly weak. To begin with, there is nothing inherently unjust about the tax imposed on petitioner; the State has unquestioned jurisdiction over the sale of alcoholic beverages within its borders, and the tax is fairly related to that event.¹⁷ Furthermore, petitioner is not in

¹⁶ As discussed at pages 27-28, *infra*, we believe that petitioner would not actually pay less tax if the various sliding scales and formulas applicable to preferred products were applied to all products, including those that it distributes. The provisions of the 1988 statute, however, make clear the form of remedy preferred by the legislature.

¹⁷ This case thus does not present, and this Court need not decide, the question whether a taxpayer subjected to an unapportioned tax, or a tax without any jurisdictional basis, would be entitled to a refund. See *Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920) (lack of authority to tax Indian allotments) and *Carpenter v. Shaw*, 280 U.S. 363 (1930) (same). In such a situation, the evil is not the disparate treatment, but the very imposition of a tax, regardless of the treatment of others similarly situated. A varia-

the position of a taxpayer seeking to be treated like most other taxpayers, as is the case whenever a few taxpayers are singled out for unusual exactions; here, the taxes at issue are generally applied, and it is the preferences that affect a very small group. What petitioner wants, in essence, is to use the existence of those preferences as a device to escape most of its tax liability for several years of beverage sales.

It is also relevant that petitioner has received significant relief. The courts below did not send petitioner away empty-handed; to the contrary, they specifically addressed its concern about the lower taxes paid on preferred products, ordering that the inequity be stopped. This case is thus quite different from cases, on which petitioner vigorously relies, where this Court has determined that refunds were the only feasible remedy for maladministration of an apparently valid state statute. See *Iowa-Des Moines Nat'l Bank v. Bennett*, *supra*; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); - see also *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 57 U.S.L.W. 4095 (January 18, 1989).¹⁸ Where discriminatory assessments are imposed on a minority of taxpayers in violation of state law, this Court has indicated that taxpayers challenging those assessments cannot be remitted to the alternative (and utterly impractical) course of challenging

tion of the same problem is presented in *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928), which turned on a lack of statutory authority to tax shares of national banking associations at a greater rate than other moneyed capital.

¹⁸ We note that, only four years after *Iowa-Des Moines*, its author, Justice Brandeis, joined a dissent by Justice Cardozo explicitly recognizing that an objector to unconstitutional disparate treatment in state tax deductions was not necessarily entitled to the benefit of the deductions, and that the entitlement turned on questions of state law and legislative purpose. *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113, 132 (1935) (Cardozo, J., dissenting).

all of those assessments greater than their own. Here, however, the injunction issued by the Florida Supreme Court immediately established the equality that petitioner sought, mandating equal tax rates for all sales of alcoholic beverages.¹⁹

The Florida Supreme Court also emphasized that distributors like petitioner "pass on" the excise tax to consumers. As the Florida court concluded, "if given a refund, cross-appellants [including McKesson Corporation] would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." J.A. 430. In a subsequent case considering distributors' claims for a refund under the pre-Bacchus tax statute, the Florida Supreme Court reiterated this fundamental point: "As in *McKesson*, appellants already have passed on the excess taxes to their customers, the taxpayers of Florida, and the funds from those taxes have been appropriated and expended by the state."

¹⁹ The other cases cited by petitioner are off the point. They are, variously, Commerce Clause cases that say not one word about remedy, *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); an Export-Import Clause case that found a state tax completely barred by that Clause, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); and a case reflecting this Court's exceptional latitude in exercising original jurisdiction, *Maryland v. Louisiana*, 452 U.S. 456 (1981). None of these cases even touches on the automatic entitlement rule that petitioner seeks.

Nor does *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912), provide support. In *Atchison*, the sole issues before the court were whether "the payment was voluntary" and whether the defendant was "the proper person to be sued." *Id.* at 285. The court concluded that the payment was made under duress and that the defendant was proper. Neither holding bolsters petitioner's contention.

National Distrib. Co. v. Office of the Comptroller, 523 So.2d 156, 158 (Fla. 1988) (emphasis added).²⁰

A refund to petitioner, therefore, would almost certainly result in a double recovery. Having received the money once from its customers, it would receive it a second time from the State. But the likely unfairness goes even further. For if the State now raised the beverage taxes to make up for the refunds, distributors like petitioners presumably would pass through the taxes (including the increase) once again—to the same customers that paid the tax the first time. It was entirely reasonable for the Florida Supreme Court to regard this outcome as unnecessary and inequitable.

²⁰ This "pass-on" analysis has profound significance in state law. Under Florida law, no refund is permissible if the taxpayer, although the one upon whom the legal incidence of the tax falls, is not the party who bears the financial burden. *State ex. rel. Szabo Food Service, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973). In this case, the Florida statutes make it absolutely clear that, although the legal incidence of the excise tax falls upon distributors such as petitioner, the distributors would be mere collection conduits for the tax. See Fla. Stat. § 561.50 (1985) (tax not due until sale); Fla. Stat. § 561.506 (1985) (wholesaler deductions from tax collection payments); Fla. Stat. § 565.13 (1985) (tax not due until 10th of month following month of sale). Notably, in arguing that state law requires a refund (Pet. Br. at 45-47), petitioner ignores this aspect of state law.

Petitioner has never denied that it passed on the excess taxes; it now claims instead that, if the tax was passed on, petitioner thereby suffered competitive injury. Pet. Br. at 42. But petitioner in its complaint sought a tax "refund," not "damages" for some indirect economic loss. See note 5, *supra*. Moreover, under Florida law, it is quite clear that the State's waiver of sovereign immunity applies only to tax refund claims when the taxpayer has borne the actual burden of the tax, *Szabo, supra*, and not to claims for damages from a legislative act. *Trancon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 918-919 (Fla. 1985).

Finally, the Florida Supreme Court could properly consider the effects of a refund on the state taxing scheme. Given the money raised each year by the general beverage tax, the sums at issue here, and in other possible cases, could amount to hundreds of millions of dollars. It would be impossible for the State to make refunds of anything like that amount without severely cutting other programs or imposing an increase in future taxes (beverage or otherwise). In addition, to create and implement an administrative scheme for recalculating and refunding taxes would be cumbersome and costly. All this might be necessary in a case of severe injustice, but this is hardly such a case.

The Florida Supreme Court recognized that it was undertaking a difficult equitable task in remedying a constitutional violation through the restructuring of a state statute. The cases that it cited reflect this recognition. See *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*); *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (1973). In *Lemon II*, this Court emphasized that "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." 411 U.S. at 200 (plurality opinion) (footnote omitted). The Court also noted that, in fashioning remedies, courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." *Id.* at 201. In structuring a remedy after careful analysis of the constitutional violation, the Florida court looked to the practical realities and reached a considered judgment about necessity, fairness, and feasibility. Petitioner might prefer a different remedy, but its preference is without constitutional basis.

C. The Decision In *Chevron Oil Co. v. Huson* Does Not Require That Petitioner Get A Tax Refund.

Although petitioner engages in an extended discussion of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (*Chevron*), and later cases involving "retroactivity," those cases do not help petitioner here. Petitioner is not asking that the decision below (that the preferences are invalid) be made "retroactive"; it is asking that a completely different decision (that everyone is entitled to the preferences) be announced for the past. Nothing in *Chevron* or its progeny requires such a tortuous result.

It is not immediately clear, in the first place, that the "retroactivity" analysis in *Chevron* would provide a basis for overruling the remedial choices of state courts. This Court stated in *United States v. Johnson*, 457 U.S. 537 (1982), that the "'federal constitution has no voice upon the subject' of retrospectivity." *Id.* at 542. That statement repeats the observations of Justice Cardozo, in considering the retroactivity of a state court opinion on the applicability of state law, that "the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932). See also *Linkletter v. Walker*, 381 U.S. 618, 629 (1965) ("the Constitution neither prohibits nor requires retrospective effect"). At a minimum, these principles suggest that state decisions regarding the retroactivity of specified remedies should not be lightly overturned.

In any event, neither *Chevron* nor any other retroactivity case involves a request similar to that made by petitioner here. In *Chevron*, the question was whether the rule of law previously articulated in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969)—that the Outer Continental Shelf Lands Act required the applica-

tion of state statutes of limitations to certain personal injury suits—applied in a personal injury suit filed against the Chevron Oil Company. The plaintiff (whose claim would be barred under *Rodrigue*) urged that the prior law should be applied, while Chevron Oil argued that *Rodrigue* should govern. Thus, the precise issue was whether a particular new rule of law should be applied to the particular litigants; in finding nonretroactivity, the Court held that it should not.

The situation in *Chevron* is representative of "retroactivity" cases in general. In such cases, one litigant is typically asking that a new rule of law be applied to its situation; the opposing party is urging that prior law be applied. See *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). Thus, for instance, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that its decision invalidating the bankruptcy courts would not apply to bankruptcy court judgments rendered before that decision. Similarly, in *Lemon II*, the Court concluded that its prior decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), would not apply to payments accrued before the date of that decision, even though they were unconstitutional under the principles there announced.²¹ In these cases, as in *Chevron*, the outcome for the affected parties turned on whether the old law or the new law applied to their situation.²¹

This case is very different: here, petitioner is not entitled to a tax refund under either the old law or the new law. Under the old law, of course, petitioner was taxed at the generally-applicable rate, and it paid its taxes

²¹ Retroactivity cases in the criminal area similarly pose the question whether the articulated rule of law will apply at all to the litigants. See *Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987) ("[A]fter we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review").

on that basis. Under the new law, however, petitioner also is taxed at the generally-applicable rate, which is no different. To obtain a refund, therefore, petitioner needs the Court to apply not the old law, or the new law, but a different law—one that gives it the benefit of the invalidated preferences. That is a matter of fashioning a new remedy, not of applying principles of “retroactivity.”²²

We believe, therefore, that the analytical framework set forth in *Chevron* should not be borrowed for claims of this type. But, even under the *Chevron* test, petitioner would not prevail. The analysis in *Chevron* calls for the consideration of “three separate factors,” 404 U.S. at 106—whether a decision establishes a new principle of law; whether non-retroactivity will further or retard operation of the legal rule in question; and whether retroactivity will produce inequity. Taken together, these factors suggest that a refund here is not required.

“Equitable considerations,” specifically referred to by the Florida Supreme Court, have long been prominent in decisions of nonretroactivity. “[W]e have weighed the inequity imposed by retroactive application, for ‘[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the “injustice or hard-

²² In an underinclusiveness analysis, if a court decides on *extension* of benefits for the future, the case may pose an issue more typical of the *Chevron* line of cases—whether the articulated rule of law, providing for extension of the selectively-conferred benefit, will apply to past conduct. See *Florida v. Long*, 108 S.Ct. 2354, 2359-2363 (1988) (citing *Chevron* in analysis of whether extension of benefits under Title VII should apply to past conduct); *id.* at 2368 (Blackmun, J., concurring in part and dissenting in part); *Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1107 (1983) (O’Connor, J., concurring).

ship” by a holding of nonretroactivity.’” *Chevron*, 404 U.S. at 107 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)). Here, as we have discussed, *see* pages 16-21, *supra*, the relief proposed by petitioner would be patently unjust. On the one hand, petitioner would be largely excused from any tax liability for the years in question; on the other hand, Florida consumers would likely be doubly taxed, and the State would have a primary revenue source thrown into turmoil because of preferences accorded a minuscule share of the wine and liquor market. This prospect presents a classic example of “substantial inequitable results.” *Cipriano v. City of Houma*, *supra*, 395 U.S. at 706.

Regarding the operation of the rule, “‘we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.’” *Chevron*, 404 U.S. at 106-07 (quoting *Linkletter v. Walker*, *supra*, 381 U.S. at 629). In the context of this case, however, “retrospective operation” will do little to further Commerce Clause principles. To the extent that the tax preferences created an impediment to interstate commerce, the impediment was extremely slight and, as a result of the decision below, temporary. On the other hand, an order excusing petitioner from most tax liability for several years would conflict with the basic principle that companies or individuals engaged in interstate commerce may be taxed to pay their fair share for the benefits they derive and the burdens they create. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977).²³ The Commerce Clause

²³ Cf. *National Can Corp. v. Department of Revenue*, 109 Wash. 2d 878, 889-90, 749 P.2d 1286, 1292, *cert. denied and appeal dismissed*, 108 S. Ct. 2030 (1988) (“The effect of complete retroactive application with refunds of all taxes paid would be to create a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers”).

is intended to stop unacceptable burdens on interstate commerce, not to undermine state tax systems whenever any interference with interstate commerce can be found.

The remaining question, and admittedly a closer one, is the novelty of the legal principle announced in this case. "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106. In our view, although they were ultimately struck down, the invalidity of the Florida preferences was not "clearly foreshadowed" by prior cases. The preferences here were very different, in kind and in effect, from the preference at issue in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which applied solely to products made in Hawaii.²⁴ As the state courts found, the Florida statute passed in response to *Bacchus* did not establish discrete categories for intra-state and interstate products.²⁵ Under the 1985 statute, products in both categories qualified for the preferences, and products in both categories were taxed at the full rate.

²⁴ In *Bacchus* itself, there was considerable dispute over whether that decision actually overturned settled precedent. See *Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting, joined by Rehnquist and O'Connor, JJ.) (Twenty-First Amendment "expressly authorizes this sort of burden"; "Justice Brandeis' opinion for the Court in the seminal case of *State Board of Equalization v. Young's Market Co.* [299 U.S. 59 (1936)] . . . squarely so decided"; "the Court's reasoning [in *State Board of Equalization*] clearly covers this case").

²⁵ The Florida Supreme Court noted: "Affidavits from several experts establish that 1) citrus and sugarcane are grown in Florida as well as in other areas of the United States and the world and 2) the specified grape species are grown throughout the Southeastern United States and the Atlantic States Regions." J.A. 423.

The statute also had very different financial provisions. For example, it included sliding scales that took into account possible growth in the market for preferred products (whether made in the State or out-of-state) and provided for full tax equality if their sales reached a certain level. Additionally, regardless of the sliding scales, the statute provided for full tax equality for two months every year. No comparable provisions were present either in Florida's predecessor statute, or in the Hawaii statute. Although the Florida courts ultimately found that these modifications were insufficient to overcome the constitutional problems, that outcome was not the sort of foregone conclusion that petitioner suggests.²⁶

Finally, we note that, because of the way that the Florida statute works, it appears that petitioner would not be entitled to the sought-after refund even if the preferences were retroactive. See Pet. Br. at 48. What petitioner has failed to take into account, indeed never

²⁶ It is entirely possible, moreover, that *Chevron* would permit nonretroactivity if one or two of the factors strongly point in that direction. Cf. *Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, supra, 463 U.S. at 1109-10 (O'Connor, J., concurring) (nonretroactivity appropriate because of equitable concerns even though foreshadowing is "debatable" and operation of legal rule will be neither furthered nor retarded by nonretroactivity). Such a view is consistent with the Court's longstanding recognition that retroactivity analysis is far from a mechanical enterprise. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940) ("The actual existence of a statute, prior to such a determination [of unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration"). Indeed, since *Chevron*, the Court has sometimes issued a stay of its judgment, or permitted past actions to remain effective despite a subsequent decision, solely because of the impact on the stability of government and without reference to the *Chevron* analysis. See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976); *Georgia v. United States*, 411 U.S. 526, 541 (1973).

even mentions, is that the tax preferences in the 1985 Florida statute are subject to formulas and sliding scales. Fla. Stat. §§ 564.06(10), 565.12(6) (1985). Under the statute, the tax on most preferred products increases in relation to the number of gallons of the product sold prior to the time of calculation. If the volume rises to a sufficient level, the tax for the preferred product will equal the generally-applicable tax. Thus, for instance, if 12,500 gallons or more of the medium-alcohol wines from the enumerated citrus and grape species are sold, the resulting tax—\$3.00/gallon—will equal the generally-applicable tax of \$3.00/gallon. § 564.06(10)(c). Similarly, if a sufficient number of gallons of natural sparkling wines from the enumerated products are sold, the tax will increase to the generally-applicable rate. § 564.06(10)(d). See note 2, *supra*.

If the sliding scales were applied without any distinction between preferred and non-preferred products—the equality that petitioner wants—it is virtually certain that the maximum rates under the scales would routinely apply. Once the gallons of alcoholic beverages sold by petitioner (and the other distributors who previously paid the generally-applicable tax) are included in the calculation, the applicable rate becomes dramatically different from the rate in effect when the sliding scales were previously calculated. Although petitioner seems to assume that it could claim the rates actually paid on preferred products, it cannot have it both ways—that is, it cannot eliminate the distinction between preferred and non-preferred products in order to use the sliding scales and then resurrect it for the purpose of setting the rates.²⁷ It appears highly likely, therefore, that petitioner would owe the same amount of tax.

²⁷ In the Title VII context, this Court's opinions are clear that, if a benefit is extended to those who have previously been excluded from the benefit, the amount of the benefit should itself be recal-

D. A Refund Is Not Required As A Deterrent Against Future Taxation.

Petitioner devotes a considerable portion of its brief to a policy argument that, unless this Court orders tax refunds, taxpayers will be at the mercy of the state legislatures. Pet. Br. at 22-24, 39-40. As support, it points to Florida's enactment in 1988 of another alcoholic beverages tax, which is likewise being challenged in the state courts. According to petitioner, only the prospect of massive refunds will keep this legislative cycle from continuing.²⁸

The first problem with this argument is that petitioner has misstated the relevant history. Thus, while petitioner suggests that, because of the new statute, its efforts in this suit produced no real relief from unequal taxation, that is not the case. In fact, the issuance of the Florida Supreme Court's mandate in May, 1988 invalidated all of the challenged preferences in the 1985 stat-

culated to reflect the changed pool of beneficiaries. See *Florida v. Long*, 108 S.Ct. 2354, 2358 n.2 (1988) (remedy for disparate treatment in gender-based benefits, for which extension rather than invalidation had been selected as the appropriate remedial option under Title VII, was "the benefits [male retirees] would have received if the Florida System had used unisex mortality tables," rather than "benefits equal to those female retirees received under the sex-based tables"); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 719-20 n.36 (1978) (awarding benefits without regard to changed pool of beneficiaries "may give the victims of the discrimination more than their due").

²⁸ Although petitioner repeatedly criticizes the Florida legislature for attempts to help local industry, it should be noted that there is nothing improper about this goal. See *Bacchus Imports, Ltd. v. Dias*, *supra*, 468 U.S. at 271 ("No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging local industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal"); *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.* (Florida Supreme Court), J.A. 428-29 (State could have furthered goal through a variety of other methods, including direct subsidies).

ute, and only the generally-applicable tax remained in effect until the effective date of the new statute in August, 1988. Moreover, implementation of the differential tax structure reflected in the new tax statute has been enjoined since the trial court decision on November 30, 1988 (a fact petitioner never mentions),²⁹ and the generally-applicable tax under the 1985 statute has once again been in effect since that judgment (another fact petitioner never mentions). Thus, since the issuance of the Florida Supreme Court's mandate in May, 1988 in the case under review, there has been only a brief period in which anything besides a generally-applicable tax has been in effect.

Petitioner also gives no weight to the fact that the state courts have expeditiously entertained objections to the state statutes, and given plaintiffs broad injunctive relief by invalidating various provisions. Far from working hand-in-glove with the legislature, the state courts have proved highly sensitive to concerns about unequal taxation. In this case, for example, the Florida Supreme Court undertook a careful analysis of the governing case law, ultimately concluding that the legislative effort was insufficient to remove the constitutional infirmity. The trial court, reviewing the 1988 statute, found that it, too, fell on the wrong side of the constitutional line. These courts remain open to petitioner, either to enforce its present injunction or, if necessary, to obtain a new one.

II. THE ELEVENTH AMENDMENT PROHIBITS THIS COURT FROM ORDERING A REFUND FROM THE STATE TREASURY.

Petitioner's claim for a refund must fail for another, independent reason: the Eleventh Amendment prevents this Court from ordering the State to pay petitioner the sum that it seeks. As we discuss below, it is clear, *first*,

²⁹ *Bacardi Imports, Inc. v. Ivey*, 88-2881 (Second Judicial Circuit of Florida, Nov. 30, 1988), *appeal pending*, Case No. 73,424 (Florida Supreme Court).

that the Eleventh Amendment bars a federal court from granting monetary damages against a State and, *second*, that the Amendment applies fully to this Court.

A. In A Suit By A Private Party Against A State, A Federal Court Cannot Order The Payment of Funds From A State Treasury.

The familiar language of the Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The governing principle of that Amendment is likewise familiar: that "a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). *See also* *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

This principle is fully applicable to claims seeking a refund of taxes on the ground that the tax has been imposed unconstitutionally. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Indeed, this Court has noted that, in taxation cases, "the sovereign exemption from judicial interference in the vital field of financial administration" is especially powerful. *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). Consequently, "[w]hen a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts." *Ibid.*³⁰

³⁰ The State of Florida has authorized suits for tax refunds in state court, but it has conditioned its waiver of sovereign immunity

There is little question, therefore, that the claim advanced by petitioner is within the terms of the Eleventh Amendment immunity. Petitioner explicitly asks this Court to direct the state court "to order a tax refund to McKesson" from the state treasury. Pet. Br. at 48. Moreover, because it appears that petitioner is a "Citizen[] of another State," its suit is squarely covered by the language of the Amendment itself. Suits by citizens of "another State" had long been held to be barred by the Eleventh Amendment, *see, e.g., Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886), even before the holding in *Hans v. Louisiana*, 134 U.S. 1 (1890), declaring that the Amendment also bars suits by a citizen against his own State.

It is also clear that this Court is a federal court. Article III of the Constitution provides that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, sec. 1; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).—"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). And, as this Court has admonished, "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *see Aldinger v. Howard*, 427 U.S. 1 (1976).

on a showing by the taxpayer that it actually bore the financial burden of the tax, rather than shifting it to another. Fla. Stat. § 215.26 (1985); *State ex rel Szabo Food Service, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973). That is a burden that petitioner cannot fairly meet. *See* pages 19-20 and note 20, *supra*.

In keeping with these principles, this Court has held that it has no power to hear a claim that would have the effect of allowing a citizen to demand a payment from a state treasury. In *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), for instance, the Court concluded that the Eleventh Amendment barred an original action filed by one State against another because the real parties in interest were private citizens in the plaintiff State. Indeed, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)—the case that produced outrage about the exercise of federal jurisdiction over a claim by a citizen against a State and directly led to the passage of the Eleventh Amendment, *New Hampshire v. Louisiana*, *supra*, 108 U.S. at 86—was itself an action brought under this Court's original jurisdiction. *See also Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (Eleventh Amendment prohibits original action by foreign government against a State).

There is nothing in the text or history of the Eleventh Amendment that would lead to a different result when the Court is exercising its appellate jurisdiction. Certainly, the Eleventh Amendment is fully applicable to this Court's review of cases from other federal courts. *See, e.g., Welch v. Texas Dept. of Highways and Public Transp.*, 107 S.Ct. 2941 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). In such cases, the Court has referred generally to limits placed by the Eleventh Amendment on "federal jurisdiction," or "the authority of the federal judiciary," or the power of—a "federal court," *Pennhurst*, 465 U.S. at 98, 99, 121, 123; it made no distinction between its own authority and the authority of other federal courts.

The same limitations apply to review of judgments from state courts. The Court does not derive judicial power in such cases from the state courts but, as in other

cases, from the provisions of Article III.³¹ Indeed, in upholding the legitimacy of its review of state court judgments, this Court has long stressed that Article III describes the kind of case, not the kind of court, that is subject to review. "The appellate power is not limited by the terms of the third article to any particular courts. . . . It is the case, then, and not the court, that gives the jurisdiction." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338 (1816) (emphasis in original). The Eleventh Amendment likewise, also speaks directly in terms of "Judicial power," prohibiting its exercise in "any suit in law or equity" without regard to the grounds of asserted jurisdiction.³²

Although state courts themselves can order payments from a state treasury, that fact does not enlarge the power of this Court. In *State of Louisiana ex rel. New York Guaranty & Indem. Co. v. Steele*, 134 U.S. 230 (1890), for example, the Court applied Eleventh Amendment principles in a suit arising out of state court, holding that it was "virtually a suit against the state." *Id.* at 232. The Court noted that the suit was against a state official "in his official capacity" and that the plaintiff had "sought to compel him to act in that capacity."

³¹ See, e.g., Art. III, sec. 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make").

³² The Eleventh Amendment does not, of course, bar this Court from hearing a claim that a State's action against an individual, as in a criminal proceeding, violated the federal constitution. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). Such a case is not a suit by a citizen against a State, and is thus outside the scope of the Eleventh Amendment.

Id. Citing prior cases under the Eleventh Amendment, the Court upheld the state court judgment.

It would elevate form over substance to say that this Court could require a state court to order a payment from the state treasury, even though the Court lacks power to enter the judgment itself. As a general matter, the Eleventh Amendment cannot be evaded by ordering state officials, rather than the State itself, to make a payment from the state treasury. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants." *Ford Motor Co. v. Department of Treasury*, *supra*, 323 U.S. at 464. The imposition of state judges as an additional link in a chain reaching from this Court to a state treasury should not be enough to overcome the Eleventh Amendment prohibition. In that case, as in any other, the State remains the real, substantial party in interest, and the impact on the treasury is just the same.³³

³³ In *Great Northern Life Ins. Co. v. Read*, *supra*, the Court indicated in *dicta* that the taxpayers could seek "review in this Court on constitutional grounds after the issues have been passed upon by the State courts." 322 U.S. at 57. See also *Ford Motor Co. v. Department of Treasury*, *supra*, 323 U.S. at 470; *Smith v. Reeves*, 178 U.S. 436, 445 (1900). The power to pass upon constitutional issues, however, exists separate and apart from the power, denied by the Eleventh Amendment, to order retroactive awards from a State Treasury. See, e.g., *Bacchus Imports, Ltd. v. Dias*, *supra* (finding violation of Commerce Clause but remanding to state courts for determination of remedy).

The Court has also said, again in *dicta*, that "[n]o Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'" *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). This statement, read as an explanation of state judicial power, is entirely correct: a state court may issue orders that are forbidden to federal courts by the

The use of state courts as intermediate agents also would lead to a peculiar sort of enlargement of judicial power. Despite the usual practice of remanding to state courts for proceedings not inconsistent with its opinion, this Court is presumed to retain the power to enter judgments itself, in cases from state courts as well as federal courts. See, e.g., *Williams v. Bruffy*, 102 U.S. 248 (1880); *Tyler v. Maguire*, 84 U.S. (17 Wall.) 253 (1873); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Martin v. Hunter's Lessee*, *supra*. If the Court could do indirectly what it cannot do directly—i.e. require payments from a state treasury by a remand to state court rather than an order to state officials—it would effectively be increasing its power merely by the discretionary form of its judgment. The notion that the invocation of such discretion can enlarge and contract federal judicial authority conflicts with settled principles of federal jurisdiction.

This Court has said that “[t]o secure the manifest purposes of the constitutional exemption guarantied by the Eleventh Amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose.” *Ex Parte Ayers*, 123 U.S. 443, 505-06 (1887). So interpreted, the Eleventh Amendment simply does not allow petitioner to pursue his claim in federal court—whether it is this Court or any other federal court.

Eleventh Amendment. Thus, had the state courts below ordered retroactive relief (as the Maine Supreme Court did in *Thiboutot*), that order would have clearly been compatible with the Eleventh Amendment. The question here, however, is whether this Court can require payments from the state treasury, notwithstanding the limitations placed on federal judicial power by that Amendment.

B. The Eleventh Amendment Bar Against Retroactive Payments From State Treasuries Will Not Prevent Substantial Protection of Constitutional Rights.

“The Eleventh Amendment is an explicit limitation of the judicial power of the United States.” *Missouri v. Fiske*, 290 U.S. 18, 25-26 (1933). Although adherence to that limitation necessarily places some restraints on remedies for constitutional violations, it does not mean that constitutional rights will go unprotected. The state courts, of course, may provide relief beyond that within the power of federal courts. And federal courts themselves may order substantial relief, notwithstanding the Eleventh Amendment.

First of all, it is well-established that injunctive relief against continuing constitutional violations remains available. Notwithstanding the Eleventh Amendment, federal courts (including this Court) retain authority to enjoin “an illegal act upon the part of a state official in attempting by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.” *Ex Parte Young*, 209 U.S. 123, 159 (1908). This is so even though the injunction has a significant effect on the state treasury. See *Milliken v. Bradley*, 433 U.S. 267 (1977). This principle ensures a full airing of federal constitutional issues and the availability of remedies for ongoing constitutional violations.

Second, the federal courts can entertain suits against state and local officials in their individual capacities. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Scheuer*, the Court noted that “[w]hile it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, . . . damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office.” *Id.* at 238 (citation omitted). The Court pointed out that “[i]n some situations a damage remedy

can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another." *Id.*

Third, suits against local governments are not barred by the Eleventh Amendment because those governments are not within the scope of the Eleventh Amendment. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Thus, the federal courts are able to entertain a wide range of federal constitutional claims in cases involving local governments. *E.g.*, *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, supra*; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).

Lastly, to the extent that Congress wishes to abrogate the state sovereign immunity embodied in the Eleventh Amendment, it is free to do so, at least when acting pursuant to section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Thus, if existing remedies prove inadequate, appropriate congressional action may further narrow the category of cases that the Eleventh Amendment excludes from the jurisdiction of the federal courts.

We also note that the immunity of government treasuries from suits for damages—even in constitutional cases—is hardly an unheard-of notion. This Court long ago observed that "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the Constitution while it was on its trial before the American people." *Hans v. Louisiana, supra*, 134 U.S. at 12. More recently, Justice Frankfurter observed that "[t]he vehement speed with which the Eleventh Amendment displaced the decision in *Chisholm v. Georgia*, . . . proves how deeply rooted that doctrine was in the early days of

the Republic." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (dissenting opinion.)³⁴

These principles are little different from those applicable to the federal government to this day. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). That immunity does not vanish merely because it may prevent a plaintiff from obtaining a full measure of monetary relief. *Cf. United States v. James*, 478 U.S. 597, 611-12 (1986). The immunity for state governments embodied in the Eleventh Amendment should receive no less respect.

³⁴ Because of the disposition below, the Florida court did not need to decide expressly whether petitioner's claim was barred by sovereign immunity. As noted earlier, the State has waived its sovereign immunity in suits for tax refunds, but only to a limited extent. See note 20, *supra*. *Cf. American Trucking Associations, Inc. v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), cert. denied, 107 S.Ct. 3262 (1987).

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be affirmed.

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JOSEPH F. SPANIOLO, JR.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

McKesson Corporation,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

DEPARTMENT OF BUSINESS REGULATION, and

OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR THE PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-192

McKESSON CORPORATION,
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
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Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

McKesson respectfully submits this Reply in response to the
State's Brief.¹

¹McKesson's updated Rule 28.1 list is attached to this Brief as
Appendix A.

The State adopts the Florida legislature's opinion that Florida's successive enactments of unconstitutional tax statutes should not cost Florida "even dollar one." (M.A. 62a) The State maintains that Florida, which has waived its sovereign immunity concerning tax refund actions, may successively enact unconstitutional tax statutes that discriminate against interstate commerce; may force a taxpayer to continue to pay the discriminatory tax while the taxpayer challenges the constitutionality of the statutes in protracted litigation; and, after the taxpayer succeeds, refuse to refund any portion of the unconstitutional taxes.

First, the State urges this Court to determine that the Eleventh Amendment bars the Court's jurisdiction to review the Florida Supreme Court's decision to limit a taxpayer's remedies so that the State can retain taxes it collected under a scheme that violates the federal Constitution. The State contends that the Florida Supreme Court should determine whether McKesson is entitled to any retroactive relief from Florida's violation of the Commerce Clause, not *initially*, before this Court's review, but *exclusively* and *finally*. Although the Court has revisited the Eleventh Amendment at various times over the years, the Court has always maintained that the Court has appellate jurisdiction to resolve finally constitutional or other federal questions.

Alternatively, the State urges this Court to abandon the Court's decisions concerning remedies for unlawful state tax statutes, and to allow the Florida Supreme Court to ignore this Court's applicable retroactivity doctrine. The State contends that Florida (and each of the other 49 states) may impose its own doctrine of retroactivity in enforcing the federal Constitution. Florida, therefore, may resolve that a taxpayer who successfully challenges Florida tax statutes on federal constitutional grounds is not entitled to any measure of retroactive relief, even though the State could not have justifiably relied on the constitutionality of its tax statutes.

The Florida Supreme Court in this case held that Florida had collected discriminatory taxes from McKesson under an unconstitutional tax scheme. The Florida court found that McKesson, as a distributor of alcoholic beverages, had suffered an economic loss as a result of a "tax scheme" that placed "a clear discriminatory burden on interstate commerce." (J.A. 422) The Florida Supreme Court in previous cases consistently had held that at least the taxpayers who challenged unlawful taxes were entitled to a refund. *See, e.g., Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Osterndorf v. Turner*, 426 So.2d 539, 545-46 (Fla. 1982). In light of the Florida court's findings in this case, and its own tax refund decisions, the court could deny a tax refund to McKesson only by ignoring this Court's applicable decisions concerning remedies.²

I. THE COURT HAS JURISDICTION TO REVIEW McKESSON'S CLAIM FOR A REFUND

The State urges the Court to reverse its historic practice and policy and find that the Eleventh Amendment precludes jurisdiction in this case. The State's argument collides with the Court's essential constitutional prerogative: the Court's appellate review of state court decisions concerning constitutional or other federal law under the Supremacy Clause.

Indeed, the Court has never viewed the Eleventh Amendment as abridging its jurisdiction to review state court's treatment of federal constitutional issues. As early as *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court determined that a writ of error to the Supreme Court is not a "suit" against the state. 6 Wheat. at 406. The Court rearticulated that rule in this century in *General Oil Co. v. Crain*, 209 U.S. 211, 233 (1908):

²The Court in this case does not have to resolve the broader question of whether, in the absence of a state refund remedy, federal constitutional principles compel states to return taxes that violate the Commerce Clause.

[i]n determining what relief this court can or should give, in respect of the [state court] judgment under review, we need not consider the scope and meaning of the Eleventh Amendment; for, it was long ago settled that a writ of error to review the final judgment of a state court, even when a State is a formal party and is successful in the inferior court, is not a suit within the meaning of the Amendment.

See also Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824).

The Court's definition of its appellate jurisdiction has never followed the State's theory for the Eleventh Amendment. In *Smith v. Reeves*, 178 U.S. 436 (1900), the Court determined that the Eleventh Amendment barred a taxpayer's initiation of a tax refund suit in federal court. Nevertheless, Justice Harlan stressed that Eleventh Amendment cases have no bearing on the power of the Court to protect rights secured by federal law. *Id.* at 445. The Court emphasized that a state's consent to suit only in its own courts remains

subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reexamined . . . if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States.

Id. *See also Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 470 (1945); *Great N. Life Insur. Co. v. Read*, 322 U.S. 47, 57 (1944) (majority opinion); *id.* at 61 (Frankfurter, J., dissenting); *Chandler v. Dix*, 194 U.S. 590, 592 (1904) (Holmes, J.).

The Court has consistently and emphatically exercised its appellate power to review state court decisions in tax refund cases implicating constitutional or other federal law issues. In many cases, the Court directly addressed the petitioner's arguments for a state tax refund. *See, e.g., Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 57 U.S.L.W. 4168 (1989); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940). In other cases, although the Court has allowed state courts to address refund issues "in the first instance," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984), the Court has never questioned its jurisdiction finally to resolve federal issues, including the appropriate remedy. *See, e.g., Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983).³

The State's surprising assertion overlooks the Court's "longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal appellate jurisdiction over suits from state courts." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 256 n.8 (1985) (Brennan, J., dissenting) (original emphasis).⁴

³*See also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Williams v. Vermont*, 472 U.S. 14 (1985); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Central Mach. Co. v. State Tax Comm'n*, 448 U.S. 160 (1980); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952).

⁴The State of Arkansas makes the astonishing suggestion that Justice Brennan's views of the Eleventh Amendment support the Court's avoiding jurisdiction. Of course, Justice Brennan and three other members of the Court have maintained that the Eleventh Amendment does not restrict any federal court's jurisdiction over federal questions. *See* dissenting opinions of

The State cites *Ford Motor Co. v. Department of Treasury*, in which the Court merely determined that the federal district court did not have original jurisdiction over a tax refund suit.⁵ Yet the State does not cite *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 57 U.S.L.W. 4168 (1989), in which the Court did not hesitate to assume jurisdiction over a Texas state court case involving a tax refund suit. Appellants in *Texas Monthly* expressly sought a refund of taxes paid under protest, alleging that the state tax violated the Establishment Clause. The Court found no basis for injunctive or declaratory relief in the case, but concluded that "[a] live controversy persists over Texas Monthly's right to recover the \$149,107.74 it paid, plus interest." *Id.* at 4170. Finding the tax unconstitutional under the First Amendment, the Court reversed the Texas appellate court's reversal of the trial court's order of a refund. Similarly, the State cites *Atascadero*, in which the Court held that the Eleventh Amendment precluded an original action in federal court seeking retroactive monetary relief. The State does not, however, cite *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), in which the Court readily granted appellate review of Indiana's unconstitutional denial of retroactive employment benefits.

Although the State's theory of the Eleventh Amendment cannot distinguish *Ford* from *Texas Monthly*, or *Atascadero* from *Thomas*, the Court's historic practice obviously does. The Eleventh Amendment applies to the federal courts' original jurisdiction, but not to the Court's

Justices Brennan, Marshall, Blackmun, and Stevens in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), *Green v. Mansour*, 474 U.S. 64 (1985), *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468 (1987).

⁵The State ignores Justice Reed's conclusion that the state's consent to suit in its own courts "leaves open the road to review in this Court on constitutional grounds." 323 U.S. at 470.

appellate review of state court decisions on federal questions. Supreme Court appellate review over state court decisions on federal issues is mandated under Article III and the Eleventh Amendment. While lower federal courts cannot exert jurisdiction over nonconsenting state courts, the Supreme Court is empowered to review state court decisions that involve claims against the sovereign. This constitutional schema reflects the careful balance between federalism and sovereign immunity. Where a state has waived sovereign immunity, the state's courts initially may review both federal and state issues, generally without the lower federal courts' interference. The Supreme Court, however, may act to vindicate federal interests and ensure consistency among all courts on vital constitutional or other federal law issues. "By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985).

Scholars overwhelmingly support the view that the Eleventh Amendment poses no bar to this Court's appellate jurisdiction over state court decisions. Professor Wolcher emphasizes that "the Court has always considered itself uninhibited by the eleventh amendment in reviewing state court decisions in constitutional cases, even those involving substantial monetary liability of the state." Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 303 (1981). Similarly, Professor Jackson recently observed that "[t]he Supreme Court has routinely reviewed on the merits adverse judgments entered by state courts on claims for affirmative monetary relief made by individuals against states." Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L. J. 1, 14-15 (1988). Professor Tribe attributes the Court's consistent practice to the "supremacy of federal law [which] requires review of the federal questions presented in such suits." Tribe, *Intergovernmental Immunities in Litigation, Taxation,*

and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv. L. Rev. 682, 685 (1976).⁶

Florida has waived its sovereign immunity against taxpayers' constitutional claims for tax refunds. Under this Court's decisions, Florida necessarily understood that its waiver of sovereign immunity would entail this Court's ultimate review of Florida courts' rulings on constitutional or other federal law issues. The Florida courts have freely entertained McKesson's federal, as well as state, arguments for a refund of state taxes. Surely, the State may not now complain that this Court has no jurisdiction to review the Florida Supreme Court's decision.

II. THE FLORIDA SUPREME COURT FAILED TO FOLLOW THIS COURT'S DECISIONS CONCERNING REMEDIES

In light of this Court's opinions in tax refund cases and Florida's authorization of tax refunds, McKesson asked the Florida Supreme Court to apply retroactively the same Commerce Clause principles that the court applied prospectively.

McKesson in this case, like the taxpayers in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), invoked the right "to equal treatment." *Id.* at 247. McKesson, like the taxpayers in *Iowa-Des Moines*, was "subjected to discriminatory taxation through the favoring of others in violation of federal law." *Id.* McKesson asked the Florida court to provide the same measure of relief that this Court provided in *Iowa-Des Moines* and in other cases. Historically, the Court has not limited the injured taxpayers' relief to a prospective

⁶See also Pagan, *Eleventh Amendment Analysis*, 39 Ark. L. Rev. 447, 452 and n.11 (1986); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1946 (1983); Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. Colo. L. Rev. 1, 9-10 (1972).

injunction. Rather, the Court has permitted the taxpayers to recover the unlawful taxes that the states had exacted. See *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981); *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940); *Montana Nat'l Bank of Billings v. Yellowstone County of Mont.*, 276 U.S. 499 (1928); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446-47 (1923); *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912).

The State cites cases such as *Welsh v. United States*, 398 U.S. 333 (1970), *Califano v. Westcott*, 443 U.S. 76 (1979), *Orr v. Orr*, 440 U.S. 268 (1979), and *Heckler v. Mathews*, 465 U.S. 728 (1984), to establish that the Florida court, in curing the Florida statutes' discrimination, either could have extended Florida's tax preferences to the excluded class or could have withdrawn the tax preferences from the favored class. However, the State's citations only support the Florida court's prerogative in choosing the form of *prospective* relief, not the form of *retrospective* relief, to cure the statutes' unconstitutionality.⁷ Indeed, in *Welsh v. United States*, 398 U.S. 333 (1970), Justice Harlan cites *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), to support his conclusion in *Welsh* that the petitioner was entitled, retroactively, to equal treatment. *Welsh*, 398 U.S. at 362 (Harlan, J., concurring in result).

This Court, in *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 57 U.S.L.W. 4168 (1989), considered a taxpayer's challenge to the constitutionality of a discriminatory tax exemption. The State of Texas, like the State in this case, argued that the taxpayer could not obtain a refund of unconstitutional taxes because the solution to the

⁷McKesson never argued that the Florida court had to strike the entire statutes rather than sever the discriminatory provisions in ordering prospective relief. Therefore, the State's citations to cases such as *Field v. Clark*, 143 U.S. 649 (1892), *Utah Power & Light Co. v. Pfof*, 286 U.S. 165 (1932), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), also are irrelevant.

unlawful tax preference was to sever the preference, not to extend it. *Id.* at 4169. The Court rejected Texas' argument. Notwithstanding the State's options concerning prospective relief, the Court held that the appellant was still entitled to pursue a recovery of the unconstitutional taxes. *Id.*

The State attempts to characterize McKesson's tax refund suit as an action for preferential treatment rather than for equal treatment. The State argues that McKesson is seeking the retroactive benefit of the unlawful tax preferences. The State adds that McKesson would not have actually received the unlawful tax preferences because of the Florida tax scheme's sliding tax rates. *Hypothetically*, if the State had taxed McKesson at the same rate as its favored competitors, the increased volume of favored products in the market would have, under the sliding scale, reduced or eliminated the tax preferences for everyone. McKesson would have received equal treatment and would not be in court today. *In fact*, the State did not treat McKesson's products the same as the favored products. The State discriminated against McKesson's products, and McKesson paid unconstitutional taxes.

The State acknowledges that Florida has waived its sovereign immunity and that Florida law specifically provides for tax refunds. The Florida courts, in numerous cases challenging Florida taxes under Florida law, have ordered the State to refund taxes to the injured taxpayers. For example, in *State ex rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493, 495 (Fla. 1956), the Florida court, ordering a tax refund, echoed Justice Holmes' statement in *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912), and stated that "[i]n this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover" the taxes.

Nevertheless, the State argues that Florida conditions its waiver of sovereign immunity for refund actions upon the taxpayer's demonstration that the taxpayer actually bore the financial burden of the tax. The Florida court did not reject McKesson's claim for a tax refund because Florida had asserted sovereign immunity or McKesson lacked standing. Florida's general refund statute, section 215.26, Florida Statutes (1985), in fact, does not include any "pass-on" clause, but rather provides that the comptroller shall pay the tax refund to the person who paid the tax. (M.A. 23a) The State cannot dispute that McKesson, in fact, paid the discriminatory excise taxes on its products. The State's sole citation, *State ex rel Szabo Food Serv., Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973), which addresses a taxpayer's standing to sue, concerned an alleged taxpayer who "bore no tax liability." *Id.* at 532. In this case, the Florida Supreme Court expressly found that McKesson was liable for the challenged taxes and has "standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact" on its business. (J.A. 416)

When the Florida court has made its decisions concerning invalid tax statutes prospective only, the court has almost always granted a refund to the taxpayers who actually challenged the statutes. *See, e.g., City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982). *But see Gulesian v. Dade County School Bd.*, 281 So. 2d 325 (Fla. 1973). In *Osterndorf*, the Florida Supreme Court applied Florida's equal protection clause and held unconstitutional a part of the state homestead tax exemption. The court held that the taxpayers who timely filed suit were "entitled to a refund of the amount of additional taxes they paid by reason of the denial of the enhanced exemption." *Id.* at 545. The court recognized the importance of enforcing equal treatment under the Florida Constitution and therefore granted effective relief despite the decision's impact on local government.

We recognize this decision will have a significant impact upon local governmental entities, but the constitutional provision which contains the \$25,000 enhanced homestead exemption

does not authorize one category of residents of this state to be favored over another category of residents.

Id. at 545-46.

In summarily rejecting McKesson's claim for a tax refund, the Florida Supreme Court failed to consider the significance of the Commerce Clause's protection of interstate commerce. The Florida court failed to recognize that, as in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984), the federal constitutional issues were "intertwined" with state tax refund issues. Florida's retention of discriminatory taxes in violation of the Commerce Clause significantly undermines enforcement of the Commerce Clause. Florida law, of course, did not require the State's retention of the taxes. On the contrary, the Florida court had to construct a new retroactivity standard that conflicts with *Chevron's* standard in order to avoid Florida's usual remedy for the State's collection of unconstitutional taxes: a tax refund.

III. IN LIGHT OF *CHEVRON*, McKESSON IS ENTITLED TO A REFUND OF UNCONSTITUTIONAL TAXES

In this century, the Court repeatedly has considered when courts may depart from the common law rule that judicial decisions operate retroactively. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court articulated a standard that implicitly acknowledges the historic rule of retroactivity but permits a court to avoid "penalizing" a party that has justifiably relied on the previous state of the law.

The Florida Supreme Court was not free to ignore *Chevron* in constructing its own standard to determine whether to apply settled Commerce Clause principles either retroactively or only prospectively. The 50 states may not independently construct 50 different standards concerning the retroactivity of a decision applying federal constitutional principles.

The Court has refused to "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967).⁸ The Court in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S. Ct. 633 (1989), reaffirmed that principle in a civil tax case. In *Allegheny Pittsburgh*, the Court considered not only the constitutionality of certain West Virginia property tax assessments, but also the adequacy of the state supreme court's proposed remedy. *Id.* at 637. After holding that the assessments violated the Equal Protection Clause, the Court ruled that West Virginia was not free to construct its own remedy that did not provide meaningful relief for the federal constitutional violation. Similarly, Florida was not free to construct its own remedial standard, ignoring the *Chevron* standard, for the constitutional violation in this case. The Court's holding in *Allegheny Pittsburgh* – "that petitioners may not be remitted to the remedy specified by" the state supreme court – is appropriate in this case. *Id.*

The State erroneously argues that *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), establishes Florida's right to impose its own retroactivity doctrine, even when Florida applies federal law. "[*Sunburst*] merely holds that the Federal Constitution imposes no barrier to a state court's decision to apply a new *state* common-law rule prospectively only." *Mackey v. United States*, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in part and dissenting in part) (emphasis added). "*Sunburst* does not, of course, suggest that [a court] may ignore constitutional interests in deciding whether to attach

⁸*Cf. Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113, 119 (1935) ("We give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the State, but where a federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law").

retrospective effect to a constitutional decision of this Court." *Lemon v. Kurtzman*, 411 U.S. 192, 200 n.2 (1973).

Chevron's narrow exception to the historic rule of retroactivity permits a court in resolving a case to depart from the usual rule of retroactivity to avoid injustice to a party that had justifiably relied on the former state of the law. Therefore, in line with *Chevron*'s rationale, *Chevron*'s first and threshold test is whether the judicial decision at issue has established a new principle of law. See, e.g., *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982); *Milton v. Wainwright*, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting).⁹

To borrow the Court's words in *Chevron* and *Hanover Shoe*, the Florida Supreme Court's decision did not "establish a new principle of law" that effected "an avulsive change" in Commerce Clause doctrine. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 499 (1968). See also *Florida v. Long*, ___ U.S. ___, 108 S.Ct. 2354, 2361-63 (1988). Therefore, the State, for obvious reasons, does not want the Court to focus on *Chevron*'s threshold test. Instead, the State suggests that the Court first consider "equitable considerations" even though the Florida court's decision merely applied settled Commerce Clause principles. The State seeks to disassociate *Chevron*'s jurisprudential rationale from any discussion of retroactivity.

⁹McKesson in its initial Brief surveys the federal Circuits' applications of *Chevron*. A majority have expressly viewed *Chevron*'s first prong as a threshold test that must be met before the presumption of retroactivity can be overcome. Indeed, federal courts have been "emphatic in demanding novelty as a prerequisite to retroactivity analysis . . ." Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. Rev. 745, 764 (1983). Most state courts considering prospectivity also require a threshold determination that the decision involves a clean break with former law. Moreover, scholars have interpreted the first prong of the *Chevron* standard as a threshold test for prospectivity analysis. See McKesson's Brief at 33-35.

The State's interpretation of *Chevron* would allow state courts, even in cases applying settled federal law, to review the consequences of their decisions and then decide not to make their decisions retroactive. The State's proposed standard would invite courts in all cases to legislate as well as adjudicate. See *Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part); *James v. United States*, 366 U.S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part); Mishkin, *The Supreme Court 1964 Term - Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 59-60, 65-66 (1965); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 932 (1962).

The Florida Supreme Court's decision in this case did not establish any new principle of law. The Florida court applied settled Commerce Clause principles in holding that the challenged tax scheme unconstitutionally discriminated against interstate commerce. "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively." *United States v. Johnson*, 457 U.S. 537, 549 (1982). Although Florida's Revised Florida Products Exemption may have been more ingenious than the original Florida Products Exemption, the Commerce Clause "forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). The State, of course, did not petition this Court to review the Florida Supreme Court's unanimous decision holding the Florida statutes unconstitutional. Under the *Chevron* standard's threshold test, the Florida Supreme Court erred in refusing to apply the established Commerce Clause principles retroactively as well as prospectively.

Moreover, even if the Florida Supreme Court had established a new principle of law, and therefore had a justification for consideration of *Chevron*'s other prongs, an appropriate analysis under *Chevron*'s second and third prongs would have established that retroactive

operation of the court's decision would advance the Commerce Clause's protection of interstate commerce and would avoid inequities.

With respect to *Chevron's* second prong, the Florida court failed to consider that the court's retroactive enforcement would advance the Commerce Clause's purpose whereas a denial of retroactive enforcement would encourage Florida (and other states) to enact unconstitutional legislation. The Florida court did not acknowledge the injury to Commerce Clause principles when states may violate the Commerce Clause with impunity. The Florida legislature's successive enactments of unconstitutional statutes exemplify the political reality that state lawmakers often succumb to substantial pressure from constituents to protect local commerce. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986); R. Posner, *Economic Analysis of Law* § 26.3 at 602 (3d ed. 1986).

The Florida court failed to recognize that the court's allowing Florida to retain the discriminatory taxes on interstate commerce may encourage other states to enact protectionist legislation. Cf. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986). Indeed, this Court's affirmance of the Florida court's resolution of this case, allowing the State to retain its discriminatory taxes, undoubtedly would fuel some state legislatures' efforts to favor local interests through protectionist legislation. See generally *Nippert v. Richmond*, 327 U.S. 416, 434 (1946). State legislatures – at no financial risk – could enact protectionist legislation that would endanger the Commerce Clause's creation of a national common market.

Finally, with respect to *Chevron's* third prong, the Florida Supreme Court did not engage in an appropriate analysis of whether retroactivity would result in significant inequities.

The Court in *Chevron*, *Lemon*, and *Northern Pipeline* determined that retroactive application of a new legal rule would produce substantial inequity *because* a party had justifiably relied on the former legal rule. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 108 (1971); *Lemon v. Kurtzman*, 411 U.S. 192, 203 (1973); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982). Florida did not justifiably rely to its detriment on any Commerce Clause principle that the Florida Supreme Court overruled. Florida's successive enactments of unconstitutional statutes hardly make the State's equitable arguments compelling.

Also, the Florida court had no factual basis for its analysis of the financial significance of retroactivity on the parties. Rather, the Florida court purported to resolve the economics of Florida's taxes even though McKesson (and all other parties) had never addressed the issue in the lower court. In connection with its motions in the circuit court for a preliminary injunction and partial summary judgment, McKesson had not requested the court to determine the amount of a refund. The Florida circuit court, after determining the Florida tax scheme was unconstitutional, simply had declared that its ruling would operate only prospectively. The State never presented any evidence to any Florida court that a Florida tax refund to McKesson would impose any significant burden on the state. The State's horrific references in its brief in this Court to Florida's potential tax refund exposure to *all* taxpayers do not cite to the record in this case because no Florida court ever received or considered the figures.¹⁰

¹⁰The State's suggestion that McKesson could have convinced the Florida courts to enjoin the Florida tax scheme before the State collected any unconstitutional taxes also has no basis in fact. Although McKesson expeditiously pursued every Florida procedure to end the State's enforcement of the challenged tax scheme, McKesson had to continue paying the full tax during the 20 months between McKesson's filing its suit and the Florida Supreme Court's issuing its mandate. See McKesson's Brief at 8-13.

The Florida court stated that McKesson probably had passed on the Florida tax to its customers and therefore a tax refund would be a windfall. (J.A. 430) However, neither the court in its opinion nor the State in its brief cite to any evidence in the record that would support their specious economic theory. The Florida court simply *speculated* that McKesson had passed on the burden of the tax. The court never reconciled its finding that McKesson suffered competitive harm as a result of Florida's discriminatory tax scheme with its statement that McKesson may have passed on the burden. (J.A. 416, 422, 425-27)

The Florida court's (and the State's) speculation contradicts the legislature's intent in enacting the statutes: to impose greater costs on interstate commerce to the advantage of local commerce. (J.A. 84, 106-09, 120, 127-30) If McKesson "passed on" a percentage of the discriminatory taxes through higher prices for its products, McKesson lost market share to local competitors distributing the favored products. The Florida legislature, of course, intended exactly that effect. Thus, the Florida Supreme Court's finding that the unconstitutional Florida tax scheme "strips away" from McKesson and other interstate competitors their "competitive and economic advantages" in order to benefit local competitors makes far more economic sense than its justification of its denial of any refund.¹¹

Under Florida's tax refund statute, McKesson seeks to recover the "excess of taxes exacted from [it]." *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931). Under the *Chevron* standard, the State may not compel McKesson to bear the burden of Florida's unconstitutional taxes on commerce.

¹¹The State does not contest that the Court's reasoning in *Hanover Shoe* and *Illinois Brick* counsels against permitting the State to condition the right to a refund of unconstitutional taxes upon a proof of the economics of the taxes. See McKesson's Brief at 42-44.

CONCLUSION

McKesson respectfully prays that this Court reverse the Florida Supreme Court's final decree with respect to its denial of retroactive relief. McKesson is entitled to a tax refund of the discriminatory portion of the taxes that the State collected from McKesson under the unconstitutional Revised Florida Products Exemption.

Dated: March 13, 1989

Respectfully submitted,

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Petitioner McKesson Corporation's Revised
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries) and Affiliates

Armor All Products Corporation
Armor All Products of Canada, Inc.
Armor All Products GmbH
APC Chemicals, Inc.
City Properties, S.A.
Comercial Farmaceutica Interamericana, S.A.
Comercial Interamericana, S.A. (Dom. Rep.)
Comercial Interamericana, S.A. (El Salvador)
Comercial Interamericana, S.A. (Guatemala)
Computer Aided Systems, Inc.
Corporacion Bonima, S.A.
Corporacion Interamericana, S.A.
Distribuidores Especialdades, S.A.
Distribuidora Farmaceutica Calox Colombiana, S.A.
Intercal, Inc.
Investigaciones Farmoquimicas De Colombia, S.A.
Laboratorios Calox, C.A.
Medilog Corporation
Medilog GmbH
Organizacion Farmaceutica Americana, S.A.
PCS, Inc.
PCS of New York, Inc.
PCS Services, Inc.
Pharmaceutical Card System Canada, Inc.
Pharmaceutical Data Services, Inc.
SDC Distributing Corp.

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JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

McKESSON CORPORATION,
v. *Petitioner,*

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

**On Writ of Certiorari to the
Supreme Court of the State of Florida**

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
v. *Petitioner,*

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY
AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS AND BRIEF OF THE
COMMITTEE ON STATE TAXATION OF THE COUNCIL
OF STATE CHAMBERS OF COMMERCE AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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IN THE
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Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioners in the above-captioned cases. Written consents of the petitioners and of the respond-

ent in Case No. 88-192 have been obtained. The consent of the respondents in Case No. 88-325 was requested but refused.

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 40 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 291 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the States and others toward developing fair and equitable standards of state taxation. Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as the instant cases in which the States of Arkansas and Florida have given "prospective only" effect to judicial decisions holding discriminatory state taxation schemes unconstitutional, thereby denying taxpayers relief from the states' levy of unconstitutional taxes.

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, No. 88-192, the Florida Supreme Court held that although Florida's tax preferred treatment for alcoholic beverages made from Florida's crops was invalid under *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the holding is "prospective" because of Florida's alleged "good faith reliance on a presumptively valid statute". The challenged alcoholic beverage excise tax scheme providing tax preferences for alcoholic beverages manufactured from certain crops, *all of which grow in Florida*, was adopted as an attempt to circumvent this Court's decision in *Bacchus*. Before this statutory amendment, tax preferred treatment was granted explicitly to alcoholic beverages manufactured and bottled in Florida from Florida products.

In *American Trucking Ass'ns, Inc. v. Smith*, No. 88-325, the Arkansas Supreme Court not only denied appli-

cation to open years of this Court's decision on June 23, 1987 in *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), invalidating Pennsylvania's highway flat taxes as unconstitutionally discriminatory under the Commerce Clause, but applied *Scheiner* prospectively from August 14, 1987, the date Justice Blackmun ordered the contested taxes be placed in escrow. 108 S. Ct. 2 (1987). Other States have sought to apply the prospectivity doctrine to avoid refunds of similar flat taxes found unconstitutional under this Court's *Scheiner* decision, including Maryland, Pennsylvania, New Jersey and Vermont. In a particularly disturbing action, the Maryland Circuit Court attempted to delay implementation of *Scheiner* until July 1, 1988. *American Trucking Ass'ns, Inc. v. Goldstein*, No. 87182090/CE67934 (Md. Cir. Ct. Oct. 23, 1987), *rev'd*, 541 A.2d 955 (Md. 1988). The split of authority and the importance of this "prospective only" problem was highlighted by the New Jersey Tax Court in its opinion issued on September 8, 1988 in *American Trucking Ass'ns, Inc. v. Kline*, No. 07-14-1667-85MVT, ordering refunds of unconstitutional truck decal taxes so that "legislators will be dissuaded from enacting legislation which discriminates against interstate commerce."

A similar "prospective only" issue is presented by the appellant before this Court in *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va.), *appeal docketed*, No. 88-421, in which West Virginia is attempting to give prospective effect only, except as to Armco, to this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), invalidating the state's wholesale gross receipts tax as unconstitutionally discriminatory under the Commerce Clause. The West Virginia Supreme Court held that the State can retain all unconstitutional taxes assessed and collected prior to June 12, 1984 and continue to assess and collect unconstitutional taxes for tax periods prior to June 12, 1984.

Until recently, States and taxpayers recognized a taxpayer's right to a refund or abatement of unconstitutionally-exacted taxes. There is a disturbing, emerging trend by some States to apply a judicial decision of unconstitutional or illegal state taxation on a "prospective only" basis, thereby allowing them to retain the financial benefit of the revenues collected under the unconstitutional law. See also *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286 (Wash.), appeal dismissed, cert. denied, 108 S. Ct. 2030 (1988) (6-3 vote on June 6, 1988); *Penn Mutual Life Ins. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W. 2d 668 (Mich. App. 1987); *OAMCO v. Lindley*, 493 N.E. 2d 1345 (Ohio 1986), aff'd on reh'g, 500 N.E. 2d 1379 (Ohio 1987), clarified, substituted op., in part, 503 N.E. 2d 1388 (Ohio 1987); *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); and *Metropolitan Life Ins. Co. v. Commissioner*, 373 N.W. 2d 399 (N.D. 1985).

In its holding of "pure prospective application" from June 23, 1987, the date of this Court's decision in *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987), the Washington Supreme Court determined that "for purposes of applying the refund statutes it is as if the taxes collected pre-Tyler were constitutionally collected." *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d at 1287. However, it has long been established that "[t]he retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of tax in the first instance. See, *Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S. Ct. 121, 123, 74 L.Ed. 478 (1930)." *United States v. State Tax Comm'n of Mississippi*, 645 F.2d 4, 5 (5th Cir.), cert. denied, 454 U.S. 896 (1981).

The purpose of the prospectivity holdings adopted by the courts below is to deny the taxpayers the remedy to which they are constitutionally entitled. The wave of

similar, recent unconstitutional "prospective only" holdings is affecting our member companies in many parts of this Nation. If permitted to stand, findings of unconstitutional state taxation by this Court will become meaningless in these jurisdictions.

By this motion, COST seeks leave to show that judicial decisions of unconstitutional state taxation should apply to all taxpayers for all open years, to prevent inequity and protect the constitutional rights of interstate taxpayers.

COST therefore urges that leave be granted to file a brief as *amicus curiae* and respectfully so moves the Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-192 and No. 88-325

MCKESSON CORPORATION,
v. *Petitioner*,

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

**On Writ of Certiorari to the
Supreme Court of the State of Florida**

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
v. *Petitioner*,

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY
AND TRANSPORTATION DEPARTMENT, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

**BRIEF OF THE COMMITTEE ON
STATE TAXATION OF THE COUNCIL OF
STATE CHAMBERS OF COMMERCE AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Tax-
ation of the Council of State Chambers of Commerce as

amicus curiae in support of Petitioners in the above-captioned cases.

INTEREST OF *AMICUS CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

An increasing number of States have given "prospective only" effect to decisions of unconstitutional state taxation in order to avoid refunds and to allow continued collection of such taxes after they have been invalidated. State courts have applied their own standards to justify their prospective rulings. While *amicus* believes the three-pronged test established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as governing consideration of whether to impose a decision prospectively only, should be abandoned in favor of the standards set forth in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), even the inadequate standards of *Chevron* have not been followed. A balancing of equities in determining the taxpayers' remedy for the imposition of an unconstitutional tax has been ignored. Taxpayers' rights to recover unconstitutionally-exacted taxes have been extinguished and States are retaining the revenues collected under unconstitutional laws.

Just as in the area of criminal litigation, application of the prospectivity standards of *Chevron* in the civil tax area has generated incompatible rules and inconsistent principles. This Court should adopt the *Griffith* rule and thereby apply decisions of unconstitutional or illegal state taxation to similarly-situated taxpayers for all open years. In the event the rule of *Griffith* is not extended to non-final civil tax cases, clarification by this Court is

needed as to the scope of the prospectivity doctrine and the appropriate standards governing determinations of non-retroactive application of judicial decisions invalidating state taxes as unconstitutional under the United States Constitution.

Guidance by this Court is needed to assure a consistent and fair system of taxation throughout the nation which will (1) allow each State to receive its just share of the total tax contribution of the nation's business sector, (2) prevent inequity and (3) protect the constitutional rights of interstate taxpayers.

ARGUMENT

DECISIONS OF UNCONSTITUTIONAL OR ILLEGAL STATE TAXATION SHOULD APPLY EQUALLY TO SIMILARLY-SITUATED TAXPAYERS FOR ALL OPEN YEARS

The rule of limited retrospectivity—that a change in law must, at a minimum, be given effect while a case is pending on direct review was established in *United States v. The Schooner Peggy*, 1 Cranch 103 (1801). While this principle was applied in *Schooner Peggy* where the intervening change in law involved a treaty, this same approach has been applied in cases where a change in law is made by statute, *Bradley v. School Board*, 416 U.S. 602 (1960); *United States v. Alabama*, 362 U.S. 602 (1960) (per curiam); *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943); *Carpenter v. Wabash Ry.*, 309 U.S. 23 (1940); by constitutional amendment, *United States v. Chambers*, 291 U.S. 217 (1934); by judicial decision, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Vandenberg v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Moore v. National Bank*, 104 U.S. 625 (1882); and where the change in law is "constitutional, statutory or judicial", *Thorpe v. Housing Authority*, 393 U.S. 268, 282 (1969).

The rule of *Schooner Peggy* was noted as being applicable in both civil and criminal litigation in *Linkletter v. Walker*, 381 U.S. 618 (1965) when this Court adopted the first of its modern retroactivity tests for cases involving application of new constitutional rules. The three-pronged test established therein applied to criminal litigation and required a "weigh[ing] of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

A separate standard for governing questions of retroactive application of new rules of law in civil cases was enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Three factors were established as relevant in determining whether a decision should have nonretrospective effect:

"First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed Second, we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation Finally, we have weighed the inequity imposed by retroactive application for where a decision of this court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice of hardship by a holding of non-retroactivity." [Citations deleted.] 404 U.S. at 106-107.

Application of the retrospective standards of *Linkletter* generated incompatible rules and inconsistent principles and thus in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), this Court adopted Justice Harlan's approach to retro-

activity propounded in *Desist v. United States*, 394 U.S. 244, 256 (1969) (dissenting opinion), and in *Mackey v. United States*, 401 U.S. 667, 675 (1971). The Court held in *Griffith* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final with no exception for cases in which the new rule constitutes a 'clear break' with the past." 107 S. Ct. at 716. Thus, the Court has abandoned its efforts, at least in the area of criminal litigation, to deviate from the established principle under the *Schooner Peggy* line of cases that new rules of law should be applied retroactively to non-final cases.

While it was noted in *Griffith* that the area of civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*", 107 S. Ct. at 713 n.8, the rationale for eliminating deviating retrospective rules applies equally here. This Court rejected any exception for a new rule which is a clear break with the past for the same reasons that failure to apply a newly-declared rule to non-final cases violates basic norms of constitutional adjudication:

"First, it is a settled principle that this Court adjudicates only 'cases' and 'controversies'. See U.S. Const. Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedures on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, *the integrity of the judicial review requires that we apply the rule to all similar cases pending on direct review.*"

• • • • •
 "[W]e fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from '[s]imply

fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.' "

"Second, *selective application of new rules violates the principle of treating similarly situated defendants the same*. As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is 'the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule. Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: 'The time for toleration has come to an end.' " [Citations deleted; emphasis supplied.] 107 S. Ct. at 713-714.

Indeed, Justice Harlan cautioned the Court in *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring), that certain distinctions suggested in civil cases, such as between clear and ambiguous statutes, decisions construing statutes for the first time, decisions overruling prior constructions of statutes, may lead the Court to a "retroactivity quagmire" similar to that which it has just escaped in the criminal field. 397 U.S. at 295. In Justice Harlan's view, new rules of law should be applied retrospectively also in non-final civil cases, there being no justification for applying principles, constitutional or otherwise, determined to be wrong to litigants who are or may still come to court. Consistent with his approach to criminal retroactivity adopted by this Court in *Griffith*, "the underlying substantive principle [is] that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them." 397 U.S. at 297. It is again that time called for by Justice Harlan when "Retroactivity' must be rethought." 107 S. Ct. at 712.

The question of the retroactive effect of judicial decisions of unconstitutional state taxation, such as that presented in the instant cases, is a significant and recurring issue, affecting hundreds of interstate taxpayers. See *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286 (Wash.), appeal dismissed, cert. denied, 108 S. Ct. 2030 (1988); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810, 2822-2823 (1987); *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847-2848 (1987); *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), appeal dismissed for want of final judgment, 107 S. Ct. 1949 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), reh'g denied, 469 U.S. 912 (1984); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), cert. denied, 464 U.S. 993 (1983). A similar retroactivity issue is presented by the appellant in *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), appeal docketed, No. 88-421.

It is clear that an increasing number of States are relying on the prospectivity doctrine to avoid refunds of unconstitutional or illegal taxes. It is equally clear that the states' use of the prospective doctrine to extinguish a taxpayer's right to a refund of unconstitutional state taxes has produced myriad problems. See also *Penn Mutual Life Ins. Co. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W. 2d 668 (Mich. App. 1987); *OAMCO v. Lindley*, 493 N.E. 2d 1345 (Ohio 1986), aff'd on reh'g, 500 N.E. 2d 1379 (Ohio 1987), clarified, substituted op., in part, 503 N.E. 2d 1388 (Ohio 1987); *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); *Metropolitan Life Ins. Co. v. Commissioner*, 373 N.W. 2d 399 (N.D. 1985). But see *Burlington Northern R.R. Co. v. Board of Supervisors*, 418 N.W. 2d 72 (Iowa 1988) (prospective effect not given federal circuit court holding that Iowa's statutory scheme for taxing personal property of a railroad

contravened a federal statute); *American Trucking Ass'ns, Inc. v. Conway*, No. S-14786WnC (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed*, No. 88-156 (Vt. Sup. Ct.) (holding of unconstitutional truck decal taxes under *Scheiner* not applied prospectively since the issue had been resolved in state court in 1983 and thus the taxpayers are entitled to the refund of escrowed tax payments); *American Trucking Ass'ns, Inc. v. Kline*, No. 07-14-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988) (taxpayers entitled to refunds of truck decal taxes since no justification existed for enactment in 1984 of obviously discriminatory taxes).

A purely "prospective only" ruling applies to all taxpayers, including the successful litigants, regardless of whether refund claims and assessments are pending or on appeal before any administrative body or court. However, state courts have also applied decisions of unconstitutional or illegal taxation retroactively to only the successful taxpayer litigants, *see Ashland Oil, Inc. v. Rose, supra*; *OAMCO v. Lindley, supra*; to only those taxpayers who are parties to pending litigation, *see Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982); or to only those taxpayers who have actions pending before any administrative body or court in the State, *see Kansas City Millwright Co., Inc. v. Kalb*, 564 P.2d 1281 (Kan. 1977); and applied the decision prospectively as to all other taxpayers.

State courts have generally applied their prospective holdings of unconstitutional state taxation effective from the date of judgment even though the taxes were invalidated under a prior decision of this Court. *But see First of McAlester Corp. v. Oklahoma Tax Comm'n, supra* (decision invalidating state bank tax as unconstitutional under *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983) effective from January 24, 1983, the date of this Court's decision). Thus, the State can retain all unconstitutional taxes assessed or collected prior to this

Court's decision and continue to assess and collect the unconstitutional taxes subsequent to this Court's decision until issuance of its own prospective decision. In effect, the State is not only applying the Court's decision prospectively but postponing prospectivity until a later date. State courts have even permitted continued collection of the invalid and unconstitutional tax for a period of time after the prospective decision where the decision is to become effective at some future date. *See Salorio v. Glaser, supra* (prospective effective date of holding Emergency Transportation Taxes unconstitutional delayed to allow the taxing authorities to collect the tax until January 1, 1984, almost six months later). *But see American Trucking Ass'ns, Inc. v. Goldstein*, 541 A.2d 955 (Md. 1988) (trial court erred in postponing effective date of its holding that Maryland decal fee was unconstitutional under *Scheiner* to July 1, 1988 to allow state collection through current fiscal year).

This Court's decisions of unconstitutional state taxation in *Tyler Pipe* and *Armco* have been given immediate prospective effect by the respective courts below, *National Can Corp. v. Washington Dep't of Revenue, supra*; *Ashland Oil, Inc. v. Rose, supra*; however, an issue raised by the appeal in *Ashland* is whether the taxpayer is even seeking retroactive application of the *Armco* decision. Questions as to what is the operative event in determining whether a prospective or retroactive remedy for unconstitutional state taxation is being sought have also arisen recently in other cases where the state tax administrator has sought retention or collection of the unconstitutional taxes after this Court's decision. *See Midland Bank & Trust Co. v. Olsen*, 717 S.W. 2d 580 (Tenn. 1986) (refunds of taxpayers' 1982 corporate excise taxes mandated by *Memphis Bank* did not involve retroactive application of that decision since the taxpayers' cause of action did not accrue until the 1982 taxes were due and paid under protest which occurred after the decision was

rendered); *American Trucking Ass'ns, Inc. v. Goldstein*, *supra* (retrospectivity not at issue since the tax obligation did not occur until approximately January 1, 1988, more than six months after the date of this Court's *Scheiner* decision).

The three-pronged test established by this Court in *Chevron* governs determinations in civil cases of whether a decision should be applied prospectively. See *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. at 2822-2823 (1987); *Griffith v. Kentucky*, 107 S. Ct. at 713 n.8 (1987). See also *American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d 377 (Ark. 1988), *cert. granted*, — U.S. —, No. 88-325; *National Can Corp. v. Washington Dep't of Revenue*, *supra*; *First of McAlester Corp. v. Oklahoma Tax Comm'n*, *supra*. Nevertheless, many state courts have applied their own criteria for prospective application of a decision holding a state tax unconstitutional, see *Ashland Oil, Inc. v. Rose*, *supra* (West Virginia Supreme Court applied state standards in ruling this Court's *Armco* decision should be given prospective effect only), and typically rest their prospective holdings on "equitable considerations" of the state's reliance on the overturned taxing statute for revenue and the great financial hardship on the State if retroactive effect were allowed, see *Penn Mutual Life Ins. Co. v. Department of Licensing and Regulation*, *supra*; *Metropolitan Life Ins. Co. v. Commissioner*, *supra*; *Salorio v. Glaser*, *supra*; or that the taxpayers, if given a refund, would "in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d 1000, 1010 (Fla. 1988), *cert. granted*, — U.S. —, No. 88-192. See also *Metropolitan Life Ins. Co. v. Commissioner*, *supra* (pass-on defense insufficient alone to deny a refund of unconstitutional taxes but may be considered in weighing the equities in a prospectivity determination). However, many

state courts find the pass-on argument lacking in merit. See *American Trucking Ass'ns, Inc. v. Conway*, *supra* ("Equity supports giving that windfall, if it exists, to the wronged plaintiffs."); *American Trucking Ass'ns, Inc. v. Kline*, *supra* ("I cannot conclude that plaintiffs will receive a windfall if a refund is granted. As between the State, which enacted a tax which was unconstitutional, and the taxpayers who were forced to pay this tax, the latter have the superior equitable claim.")

Furthermore, the three-pronged *Chevron* test has been given varying interpretations by the States as to the proper weight to be given each factor and as to the correct analysis required in applying the test to determine whether a decision of unconstitutional state taxation has declared a "new principle of law". The first *Chevron* factor requires that if a decision is to be applied prospectively only, it must have established a new principle of law by either overruling clear past precedent on which litigants may have relied or deciding an issue of first impression whose resolution was not clearly foreshadowed. This Court has stated that in civil cases this "clear break" principle has usually been . . . the threshold test for determining whether or not a decision should be applied nonretroactively." *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982). Some States have applied the "clear break" principle as the threshold requirement in their prospectivity determinations, see *National Can Corp. v. Washington Dep't of Revenue*, *supra*; *First of McAlester Corp. v. Oklahoma Tax Comm'n*, *supra*; while others have given equal weight to all three *Chevron* factors, see *American Trucking Ass'ns, Inc. v. Smith*, *supra*.

State courts have also applied varying standards in determining whether a decision has established a "new principle of law" under the first *Chevron* criterion. In its ruling that this Court's decision in *Scheiner* should apply prospectively only, the Arkansas Supreme Court

found this aspect of the *Chevron* test was satisfied because *Scheiner* "declared invalid a tax which a reasonable person could easily have found to pass Commerce Clause muster upon examination of *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), in which 'flat' highway taxes were held not violative of the Commerce Clause." *American Trucking Ass'ns, Inc. v. Smith*, 746 S.W. 2d at 378-379. Cf. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So.2d at 1010 (prospective application of holding of unconstitutional tax preference scheme under this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), justified because tax was collected by division in good faith reliance on presumptively valid statute). But see *American Trucking Ass'ns, Inc. v. Kline*, *supra* (holding of unconstitutional truck decal taxes under *Scheiner* not applied prospectively since this decision was clearly foreshadowed by this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)).

The Washington Supreme Court finding in *National Can* that this Court's *Tyler Pipe* decision established a new principle of law overruling past precedent on which litigants may have relied was based on "[the Washington Supreme Court's] unanimous decision in *National Can* and *Tyler Pipe*, the long line of [Washington Supreme Court] cases upholding the Washington B & O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler*", *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d at 1288, even though the holding was "clearly foreshadowed" by the Department of Revenue at least by the time this Court issued its decision in *Armco* on June 12, 1984, *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. at —. See also *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709

P.2d at 1036 ("Although the new principle of law established in *Memphis Bank* might be characterized as merely a progression from former decisions, it was not foreseen by the Commission, nor by the Oklahoma Legislature."). The West Virginia Supreme Court of Appeals, applying standards similar to those in *Chevron*, relied principally on this Courts' dismissal of the appeal in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982), involving a similar wholesale gross receipts tax, for its conclusion that this Court's *Armco* decision "represented a reversal of prior precedent". *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d at 536.

A question raised by these cases is whether the standards applied by the state courts satisfy *Chevron*'s "new principle of law" or "clear break" with precedent requirement. It has long been clear that the Commerce Clause prohibits taxes which favor local business over interstate commerce. See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 415 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987); and *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987). Despite the clarity of this principle, attempts to circumvent it are limited only by the imagination and the energy of state tax collectors. If a judicial decision of unconstitutional state taxation involves large potential refunds for many taxpayers, it is probable that no refunds will be granted. State courts have applied varied prospectivity standards to allow the States to retain the revenues collected under an unconstitutional tax.

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, there was clearly neither a "new principle of law" nor a "clear break" with precedent. There was nothing more than a transparent attempt to circumvent

the Court's decision in *Bacchus*. In *American Trucking Ass'n, Inc. v. Smith*, there was also neither a "new principle of law" nor a "clear break". Both cases represent the worst side of government—flagrant attempts to collect and retain taxes which the government knows are unconstitutional. Some States even assert penalties for failure to pay unconstitutional taxes. What could be more outrageous?

The rationale of this Court in *Griffith* for abandoning the prospectivity doctrine in non-final criminal cases is as compelling in civil tax cases. Just as in criminal cases where substantial conceptual difficulties arose by not applying new rules retroactively, application of the prospectivity standards of *Chevron* has generated incompatible, unworkable rules and inconsistent principles which are often ignored at lower levels. In cautioning against this "retroactivity quagmire", similar to which the Court has just escaped in the criminal field, Justice Harlan also reasoned:

"The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court. The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, see my *Desist* dissent, *supra*, so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the

parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life." *United States v. Estate of Donnelly*, 397 U.S. at 295-296 (Harlan, J., concurring).

Adoption of Justice Harlan's view of uniform retroactive application of new decisional rules in civil cases unless a transaction is beyond challenge because of a bar of *res judicata* or statute of limitations would avoid this retroactivity quagmire and comport with basic norms of constitutional adjudication and the principle of treating similarly situated taxpayers similarly, the same considerations underlying this Court's decision in *Griffith*.

In the event this Court declines to adopt Justice Harlan's approach as to the retroactive application of judicial decisions of unconstitutional state taxation, guidance by this Court is needed as to the scope of the prospectivity doctrine and the appropriate standards governing determinations of non-retroactivity. State courts have applied their own criteria for their prospective decisions. The *Chevron* test has proven to be unworkable, resulting in varying interpretations by the States. Different standards have been applied in determining whether a decision of unconstitutional state taxation has established a "new principle of law" under the first *Chevron* criterion, producing contrary conclusions between States with respect to the very same decision of unconstitutionality issued by this Court. States are also divided as to whether application of decisions invalidating discriminatory state taxes further or retard operation of the Commerce Clause. Equitable considerations are frequently biased in favor of the State which enacted the unconstitutional tax, thereby permitting the State to retain and continue to collect revenues under the unconstitutional law. Taxpayers' rights to illegally-collected taxes under this Court's recent decisions of unconstitutionally discriminatory state taxation are dictated, not by meaningful and dependable

standards for determining retrospective application of the enunciated constitutional rules, but by the individual state court's proclivities. This Court, if it determines that the prospectivity doctrine continues to apply in the area of civil tax litigation, should make it clear that non-retroactivity of decisions of unconstitutional state taxation is governed by the *Chevron* test and provide a meaningful interpretation of the *Chevron* standards. The better result would be the replacement of the *Chevron* standards with the *Griffith* standards.

CONCLUSION

For the foregoing reasons, this Court should (1) reverse the decisions below, (2) order the respective agencies to pay the disputed tax refunds, and (3) rule that the *Griffith* standards are being extended to civil tax cases.

Respectfully submitted,

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Dated: January 6, 1989

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

McKESSON CORPORATION,
v. *Petitioner,*

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and the
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
v. *Petitioners,*

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND
TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writs of Certiorari to the Supreme Court of Florida
and the Supreme Court of Arkansas

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF TAX EXECUTIVES INSTITUTE, INC.
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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IN THE
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OCTOBER TERM, 1988

No. 88-192 and No. 88-325

McKESSON CORPORATION,
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DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
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and the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
ON BEHALF OF TAX EXECUTIVES INSTITUTE, INC.
IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully moves the Court for leave to file the accompanying brief in support of Petitioners in this case as *amicus curiae*. Tax Executives Institute has requested the written consent of all parties to the filing of the accompanying brief. Petitioners and Respondents Division of Alcoholic Beverages, *et al.*, have consented to the filing of the brief, but the written consent of Respondents Maurice Smith, *et al.*, has not been received.*

1. Tax Executives Institute, Inc. is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,300 members who represent more than 2,000 of the leading corporations in the United States and Canada. The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

2. a. This case addresses the extent to which States may effectively attenuate decisions by this Court that

* The consents of Petitioners and of Respondents Division of Alcoholic Beverages, *et al.*, have been filed with the Clerk of the Court. Respondents Maurice Smith, *et al.*, have neither denied nor granted Tax Executives Institute's request for written consent. If such consent is subsequently received, it shall promptly be filed with the Clerk of the Court.

state tax statutes unconstitutionally infringe upon interstate commerce by applying those decisions on a prospective-only basis. Nearly five years ago, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court invalidated a Hawaii statute under which local products were exempt from the alcoholic beverage tax as repugnant to the Constitution's Commerce Clause. See U.S. Const. art. I, § 8, cl. 3. Earlier this year, the Supreme Court of Florida considered the constitutionality of a substantially similar Florida statute; although ruling on the basis of *Bacchus* that the Florida law violated the Commerce Clause, the Florida court concluded—without even citing the Court's seminal decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)—that its finding of unconstitutionality should apply on a prospective-only basis. *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), reprinted in Appendix B to McKesson Corporation's Petition for a Writ of Certiorari (McKesson App. B).

b. Similarly, two terms ago, the Court in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), ruled that the Commerce Clause was violated by two Pennsylvania statutes that imposed lump-sum annual taxes on the operation of trucks on Pennsylvania highways. Three days later, a pending case involving a similar Arkansas statute was remanded to the Supreme Court of Arkansas for further consideration in light of that case. *American Trucking Associations, Inc. v. Gray*, 107 S. Ct. 3252 (1987). On March 22, 1988, the Arkansas court held that the Arkansas statute offended the Commerce Clause. The court, however, construed *Chevron* not to mandate the retroactive application of its decision. *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), reprinted in Appendix A to the American Trucking Associations' Petition for a Writ of Certiorari (ATA App. A). The court not only concluded that no refund need be made of taxes collected

under the unconstitutional statute before this Court's decision in *Scheiner* but further held that taxes collected after the decision—up until the time an escrow was imposed on the State by Justice Blackmun, 108 S. Ct. 2 (1987)—could be retained by the State. ATA App. A at 5a.

3. a. Tax Executives Institute's members have a vital interest in the resolution of the prospective-only issue raised by the *McKesson* and *American Trucking Associations* (ATA) cases. This Court's resolution of these cases will affect far more than the State of Florida's and the State of Arkansas's ability to retain the unconstitutional taxes they have collected from particular taxpayers. The Institute is concerned that the decisions of the Florida and Arkansas courts, if not reversed, could substantially dilute the protection intended by the Commerce Clause. Should the Court affirm either decision, courts and legislatures in other States may well conclude that the Constitution does not bar either the enactment of tax statutes that discriminate against interstate commerce or even the collection of discriminatory taxes *pendente lite*, but rather only the continued collection of discriminatory taxes after the unconstitutionality of the particular statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned—see, e.g., *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), appeal dismissed for want of final judgment, 107 S. Ct. 1949 (1987) (remand pending) (the Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco); *National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 P.2d 1286 (1988), appeal dismissed and cert. denied, 108 S. Ct. 2030 (1988) (the Court's finding of unconstitutionality in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987), will be applied on a prospective-only basis). Obversely, if the Court reverses the Florida and Arkansas decisions, the

right of all taxpayers to be free from taxes that impose undue burdens on interstate commerce will be vindicated and the Commerce Clause itself will be vivified.

b. The members of the Institute and their employers would bear the additional and discriminatory costs that could result from the States' continued misapplication (or nonapplication) of the *Chevron* standard. Because they would consequently suffer the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that could result from the Florida and Arkansas decisions, the Institute has a special and direct interest in the outcome of this case.

WHEREFORE, it is respectfully requested that Tax Executives Institute's motion for leave to file the accompanying brief *amicus curiae* in support of the Petitioners in the case be granted.

Respectfully submitted,

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Date: January 6, 1989

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC.
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioners. Tax Executives Institute, Inc. is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,300 members who represent more than 2,000 of the leading corporations in the United States and Canada. The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

SUMMARY OF ARGUMENT

This case addresses the extent to which States may effectively attenuate decisions by this Court that state tax statutes unconstitutionally infringe upon interstate commerce by applying those decisions on a prospective-only basis. Nearly five years ago, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court invalidated a Hawaii statute under which local products were exempt from the alcoholic beverage tax as repugnant to the Constitution's Commerce Clause. See U.S. Const. art. I, § 8, cl. 3. Earlier this year, the Supreme Court of Florida considered the constitutionality of a substantially similar Florida statute; although ruling on the basis of *Bacchus* that the Florida law violated the Commerce Clause, the Florida court concluded—without even citing the Court's seminal decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)—that its finding of uncon-

stitutionality should apply on a prospective-only basis. *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), reprinted in Appendix B to McKesson Corporation's Petition for a Writ of Certiorari (McKesson App. B).

Similarly, two terms ago, the Court in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), ruled that the Commerce Clause was violated by two Pennsylvania statutes that imposed lump-sum annual taxes on the operation of trucks on Pennsylvania highways. Three days later, a pending case involving a similar Arkansas statute was remanded to the Supreme Court of Arkansas for further consideration in light of that case. *American Trucking Associations, Inc. v. Gray*, 107 S. Ct. 3252 (1987). On March 22, 1988, the Arkansas court held that the Arkansas statute offended the Commerce Clause. The court, however, construed *Chevron* not to mandate the retroactive application of its decision. *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), reprinted in Appendix A to the American Trucking Associations' Petition for a Writ of Certiorari (ATA App. A). The court not only concluded that no refund need be made of taxes collected under the unconstitutional statute before this Court's decision in *Scheiner* but further held that taxes collected after the decision—up until the time an escrow was imposed on the State by Justice Blackmun, 108 S. Ct. 2 (1987)—could be retained by the State. ATA App. A at 5a.

Tax Executives Institute's members have a vital interest in the resolution of the prospective-only issue raised by the *McKesson* and *American Trucking Associations (ATA)* cases. The Court's resolution of these cases will affect far more than the State of Florida's and the State of Arkansas's ability to retain the unconstitutional taxes they have collected from particular taxpayers. The Institute is concerned that the decisions of the Florida and

Arkansas courts, if not reversed, could substantially dilute the protection intended by the Commerce Clause. Should the Court affirm either decision, courts and legislatures in other States might well conclude that the Constitution does not bar either the enactment of tax statutes that discriminate against interstate commerce or even the collection of discriminatory taxes *pendente lite*, but rather only the continued collection of discriminatory taxes after the unconstitutionality of the particular statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned—see, e.g., *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), appeal dismissed for want of final judgment, 107 S. Ct. 1949 (1987) (remand pending) (the Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco); *National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 P.2d 1286 (1988), appeal dismissed and cert. denied, 108 S. Ct. 2030 (1988) (the Court's finding of unconstitutionality in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987), will be applied on a prospective-only basis). Obversely, if the Court reverses the Florida and Arkansas decisions, the right of all taxpayers to be free from taxes that impose undue burdens on interstate commerce will be vindicated and the Commerce Clause itself will be vivified.

The members of the Institute and their employers would bear the additional and discriminatory costs that could result from the States' continued misapplication (or nonapplication) of the *Chevron* standard. Because they would consequently suffer the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that could result from the Florida and Arkansas decisions, Amicus Tax Executives Institute has a special and direct interest in the outcome of this case. The Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron* standard, it may be appropriate for

the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause. See *Griffith v. Kentucky*, 479 U.S. 314 (1987).

ARGUMENT

I.

A. McKesson: The Florida Statute

The constitutional fate of the State of Florida's alcohol beverage law was effectively sealed by the Court's 1984 decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In that case, the Court addressed whether the State of Hawaii's exemption from the liquor excise tax for local products contravened the Constitution's Commerce Clause. Observing that the presence of either a discriminatory purpose, citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977), or a discriminatory effect, citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), justified a finding of proscribed "economic protectionism," 468 U.S. at 270, the Court concluded that the Hawaii statute violated the Commerce Clause "because it had both the purpose and effect of discriminating in favor of local products." 468 U.S. at 273 (footnote omitted).

In response to the Court's decision in *Bacchus*, the Florida legislature held hearings to consider possible amendments to a Florida statute that was substantially similar to that struck down in *Bacchus*. The legislature removed the word "Florida" from the statute and, in its place, enacted language that, among other things, granted exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane, and certain grape species, all of which were grown in Florida. The petitioner in No. 88-192, McKesson Corporation, challenged the validity of the revised statute, arguing that it effected the same proscribed, discriminatory re-

sult as its predecessor.¹ The Supreme Court of Florida agreed that the tax scheme placed "a clear discriminatory burden on interstate commerce." McKesson App. B at 11a. The Florida court reasoned that the State's interest in promoting alcoholic beverages made with Florida products was fundamentally at odds with the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." McKesson App. B at 18a, citing *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980).²

Notwithstanding its conclusion that the Florida statute was unconstitutional (citing both *Bacchus* and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977)), the Florida court held that its ruling should not be given retroactive effect. In reaching this result, the court made no reference to this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in which the governing standards for gauging the retroactivity of judicial decisions in civil cases were articulated. Rather, the court simply stated:

We agree with the DABT [Department of Alcoholic Beverages and Tobacco] that the prospective nature of the rulings below was proper in light of the equitable considerations present in this case. See *Guleasian v. Dade County School Board* 281 So.2d 325

¹ One sponsor of the revised Florida statute explained to the legislative committee that the changes were designed "simply to retain what we have done for the last twenty years." McKesson Corporation's Petition for a Writ of Certiorari at 2.

² The court quoted the following from *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985): "[I]n *Bacchus*, although we observed as a general matter that 'a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry,' we held that in doing so, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business." 470 U.S. at 877 n.6 (citations omitted), quoted at McKesson App. B at 18a-19a.

(Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). Not only was the tax preference scheme implemented by the DABT in good faith reliance on a presumptively valid statute, . . . [but] if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has been passed on to their customers.

McKesson App. B at 21a.

B. ATA: The Arkansas Statute

From the time of its enactment in 1983, the State of Arkansas' Highway Use Equalization (HUE) Tax was the subject of constitutional attack.³ Even before the tax went into effect, the petitioners in No. 88-325 brought suit challenging its constitutionality under the Commerce Clause. During the pendency of that litigation, this Court ruled that a substantially similar Pennsylvania tax discriminated unreasonably against interstate commerce and was therefore unconstitutional. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987).⁴ In the Pennsylvania case, the Court reviewed its prior decisions, and concluded:

We find dispositive those of our precedents which make it clear that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States.

³ Under the Arkansas legislation, heavy trucks operating on the State's highways were required to pay either an annual flat tax of \$175 or a tax of five cents for each mile traveled in Arkansas; if a vehicle traveled more than 3,500 miles in a year, it was to the carrier's advantage to elect to pay the flat \$175 rate.

⁴ ATA's challenge to the Arkansas HUE tax was pending in the Court at the time a decision was rendered in the Pennsylvania case (*Scheiner*). Following the Court's decision, the decision of the Supreme Court of Arkansas was vacated and remanded for reconsideration in light of *Scheiner*. See *American Trucking Associations, Inc. v. Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986), vacated and remanded, 107 S. Ct. 3252 (1987).

107 S. Ct. at 2839 (footnote omitted). Among the cases the Court relied on in evaluating the Pennsylvania flat tax was *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which the Court said had “necessarily called into question the future vitality of earlier cases that had upheld facially neutral flat taxes against challenges premised on the rule of immunity for interstate commerce.” 107 S. Ct. at 2846.

Notwithstanding the *Scheiner* decision, the State of Arkansas continued to collect the Arkansas HUE tax.⁵ Indeed, the taxes were not even escrowed until August 14, 1987, when the State was ordered to establish an escrow fund by Justice Blackmun (acting in his capacity as Circuit Justice). 108 S. Ct. 2 (1987). On March 14, 1988, the Supreme Court of Arkansas held that there was “little doubt” that this Court would—under *Scheiner*—strike down the Arkansas HUE tax, and accordingly, the Arkansas court held the tax to be unconstitutional. ATA App. A at 2a-3a.

Utilizing *Chevron*’s governing test, the court concluded that its decision should be applied on a prospective-only basis. Indeed, the court extended the period of non-application of the *Scheiner* decision forward to August 14, 1987—the date Justice Blackmun ordered that the HUE taxes be placed in escrow.⁶

C. The Importance of These Cases

Amicus Tax Executives Institute submits that the proper resolution of the retroactivity issue—and the clarification of the standard to be used in resolving particular

⁵ The HUE tax was repealed during an October 1987 special session of the Arkansas legislature; in its place, the legislature imposed a replacement tax of 2½ cents per mile, with no ceiling for extensive highway use.

⁶ From the time the HUE tax was enacted in 1983 until Justice Blackmun’s order of August 14, 1987, approximately \$159 million was collected under the discriminatory taxing scheme. ATA App. A at 3a.

cases—is of paramount importance. If the standard is not clarified, other States may conclude that they are free to apply this Court’s decisions on a prospective-only basis. Such a result could frustrate the policy underlying the Commerce Clause by allowing the States to enjoy the financial benefits of their discriminatory taxation—the fruits of their own unconstitutional acts. Perhaps more fundamentally, failure to clarify the weight and effect to be given to decisions of the Court could undermine its overall authority as the arbiter of constitutional issues.

II.

Although the Constitution neither prohibits nor requires retrospective effect, *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), the rule remains that “a legal system based on precedent has a built-in presumption of retroactivity.” *Solem v. Stumes*, 465 U.S. 638, 642 (1984). *Accord Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987). See generally L. Tribe, *American Constitutional Law* 29-30 & n.20 (2d ed. 1988).⁷ Thus, although exceptions to the rule of retroactivity should be recognized as a matter of policy, the exceptions should not swallow the rule.⁸

In respect of civil cases, the factors to be analyzed in resolving the retroactivity issue were set forth by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).⁹

⁷ The general rule can be traced to Blackstone. 1 W. Blackstone, *Commentaries* *70-71; see *Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

⁸ See *EEOC v. Vucitech*, 842 F.2d 936, 941-42 (7th Cir. 1988) (“[t]he presumption [is] strongly in favor of retroactive application”).

⁹ The *Chevron* case did not involve the retroactive effect to be given to a ruling of *unconstitutionality*. Rather, the case addressed the reach of a decision that Louisiana’s statute of limitations governed claims for personal injuries sustained on the Outer Continental Shelf off the coast of Louisiana. In *Chevron*, the Court

In that case, the Court confirmed the general rule of retroactivity and held that, in determining whether there should be an exception to that rule, the following three factors should be considered:

- *Reliance*: Whether the decision establishes a new principle of law or involves an issue of first impression whose resolution was not clearly foreseen.
- *Purpose*: Whether, based on the history of the rule in question, its purpose and effect, non-retroactive application will advance or retard the operation of the new rule.
- *Inequity*: Whether non-retroactive application is necessary to avoid injustice or hardship.

404 U.S. at 106-07. See Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues under the Commerce Clause*, 41 Tax Lawyer 103, 138-39 (1987).

The Supreme Court of Florida in *McKesson* made no reference to *Chevron* in ruling that it need not apply its decision of unconstitutionality retroactively. The State of Arkansas in *ATA* acknowledged the relevance of the Court's decision, but construed it to permit the application of the *Scheiner* case on a prospective-only basis. In doing so, the Arkansas court transmogrified the three-part test of *Chevron* into a standard so pliable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only basis.

That neither the Florida nor the Arkansas decision can withstand scrutiny under a proper reading of *Chevron* is

held that its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), should not apply retroactively to litigants who had relied on several federal cases holding that admiralty law (specifically, the doctrine of laches) controlled the issue. 404 U.S. at 108-09. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), which changed the analysis to be used in criminal procedure cases, the Court confirmed that *Chevron* continues to govern civil cases. 479 U.S. at 322 n.8.

confirmed by analyzing the three factors seriatim. The first factor—whether the decision at issue established a new principle of law—is, of course, the threshold requirement for prospective-only treatment: *if the governing principle was extant at the time of the decision, then the decision must be applied retroactively.*¹⁰

The principle underlying the instant cases—that discrimination against interstate commerce in the exercise of local taxing authority is unconstitutional—is far from new. Even before *Bacchus* and *Scheiner*, this Court had clearly ruled that the Commerce Clause proscribed tax statutes treating interstate businesses less favorably than local businesses. As the Court observed in *Scheiner*:

Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause.

107 S. Ct. at 2841-42, citing *Tyler Pipe Industries; Bacchus; Armeto Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977).

Had the Supreme Court of Florida properly applied the *Chevron* standard, it surely would have concluded that its decision had to be given retroactive effect. The Florida court did not break new ground in striking down the Florida alcohol beverage law; it expressly relied on this Court's decisions in *Bacchus* and *Hunt v. Washington State Apple Advertising Commission*—decisions rendered four and eleven years before the Florida court's decision.

¹⁰ See *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982) (if the "new principle" standard is not met, *Chevron*'s other two factors need not be considered—the decision will be applied retroactively).

The Florida court did aver that the State had implemented the taxing scheme "in good faith reliance on a presumptively valid statute." McKesson App. B at 21a. All statutes are presumed to be valid, however, until a court otherwise holds. To conclude that a State's spurious "presumption of validity" satisfies the reliance prong of the *Chevron* standard would be to rob the test of all worth: States could act with virtual impunity, knowing that their "reliance" on "presumptively valid statutes" immunized them from constitutional attack. Indeed, States might infer a subtler, more disturbing message from such an approach: perhaps ignorance of the law is an excuse.¹¹

As to the Arkansas HUE tax, the question whether *Scheiner* represented a "clear break" with prior precedent—thereby leaving open the issue of its retroactive application—is concededly problematic. From the date of the Court's decision in *Scheiner*, however, the result is clear beyond peradventure: the HUE tax was unconstitutionally discriminatory and any taxes collected under such a tax should be refunded.

Even with respect to pre-*Scheiner* periods, it is not clear that the Arkansas decision survives *Chevron*'s threshold test. The question is not, as the Arkansas court assumed, "whether it was reasonable for the state to have conducted itself as it did" or whether "a reasonable person could easily have found [the tax] to pass Commerce Clause muster." ATA App. A at 3a-4a. Rather, the first *Chevron* factor focuses on whether the decision "overruled clear past precedent" or involved "an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. In light of the Court's

¹¹ See *Chapman v. California*, 386 U.S. 18, 21 (1967) (criminal procedure case). ("we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights").

earlier decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the result in *Scheiner* can be said to have been clearly foreshadowed. *American Trucking Association v. Kline*, No. 07-17-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988).¹²

Chevron's second test addresses whether non-retroactive application of the new rule will advance or retard the operation of the new rule. Again, the Florida court was silent on this issue. The Arkansas court, however, proffered a beguiling argument. Specifically, the court quoted from a decision of the Washington Supreme Court in which non-retroactive application of this Court's decision in *Tyler Pipe Industries* was sustained. In that Washington case, the court blithely stated:

It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate commerce is in the past

National Can Corp. v. Department of Revenue, 109 Wash. 2d 878, 888, 749 P.2d 1286, 1291 (1988), appeal dismissed and cert. denied, 108 S. Ct. 2030 (1988), cited at ATA App. A at 4a.

Under the Arkansas court's reading of *Chevron*'s purpose test, a ruling of unconstitutionality would never be applied retroactively and the States would have an incentive to enact unconstitutional statutes.¹³ The overall

¹² In *Kline*, the New Jersey Tax Court held that *Scheiner* should be applied retroactively. The court stated that "[e]ven if *Complete Auto Transit* did not specifically overrule the *Greyhound* and *Aero Mayflower* cases of 1935, 1947 and 1950, . . . the invalidity of flat taxes which discriminate as a matter of practical effect was clearly foreshadowed by *Complete Auto Transit*." Slip Op. at 9. The *Aero Mayflower* cases—*Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935)—were cited by the Arkansas court as cases on which it relied in initially sustaining the HUE tax. ATA App. A at 4a.

¹³ See Tatarowicz, *supra*, 41 Tax Lawyer at 141-42 ("the practical effect [of prospective-only application] would be to permit

result, therefore, would be to retard the purpose of the Commerce Clause.

The courts' treatment of the inequity test in *Chevron* is particularly troubling. Under *Chevron*, the issue is whether prospective application is necessary to avoid injustice or undue hardship. Both the Florida and Arkansas courts devoted precious little time to analyzing any hardship the retroactive application of the decisions might bring. In *McKesson*, the Florida court referred to "equitable considerations," but focused not on any hardship to the State but rather on the "windfall" the petitioners would "in all probability" receive (on the assumption that the unconstitutional taxes could be passed on to customers). *McKesson* App. B at 21a. The Arkansas court, too, made reference to the "unconscionable windfall" the petitioners would receive if refunds were ordered; it also raised the specter of hardship in its references to the State's having spent or "counted on" the collected unconstitutional taxes. *ATA* App. A at 4a-5a.¹⁴

The courts' "windfall" analysis not only lacks factual support¹⁵ but, more fundamentally, focuses on the wrong

states the financial benefits of discriminatory taxation. A state could enact tax laws without concern for constitutional limitation, knowing that, if such laws were ultimately found to discriminate against interstate commerce, they could be repealed with impunity. . . . [T]he prospective application of a finding of unconstitutionality retards the purpose of the commerce clause by offering the inducement of clear financial advantage to those states that violate it."

¹⁴ That the State had already expended the unconstitutional HUE taxes, or at least taken them into account for budgeting purposes, was the court's justification for refusing to order refunds of the taxes collected during the post-*Scheiner*, pre-escrow period. *ATA* App. A at 5a.

¹⁵ See *Bacchus*, 468 U.S. at 267 (even if the tax is completely and successfully passed on, taxpayers are entitled to litigate the extent to which the discriminatory tax adversely affected their ability to compete against local producers).

party. The issue is not whether a litigant might enjoy a benefit from lodging a successful challenge to an unconstitutional statute; that is often the case. Instead, it is whether there are factors present that, despite the losing litigant's culpability, militate against the general rule of retroactivity. Thus, the inequity test measures the hardship or injustice that might befall the State (or third parties) and balances that hardship against the right (constitutional or economic) that would be more fully vindicated by the retroactive application of the decision.

Under a properly framed inequity test, there should be no doubt that the "hardship" endured by the States—the required refund of unconstitutional taxes that had been "counted on"—does not pass muster. Indeed, if such a "hardship" were deemed sufficient to justify prospective treatment, unconstitutional tax statutes would rarely, if ever, be overturned retroactively. States invariably spend the revenues they collect. The sounder approach is to examine whether *undue* hardship would result from retroactive application of a decision. Under such an analysis, a different result obtains, for the "hardship" of which the States might complain is one of their own making—the result of their own unconstitutional acts.¹⁶

In this regard, it is instructive to consider those cases in which the Court has provided relief under the inequity prong of the *Chevron* test (or comparable standards). For example, in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*)—which was the only decision of this Court that the Florida court in *McKesson* cited on the retroactiv-

¹⁶ Thus, the courts' suggestion that retroactive application is inappropriate because the petitioners in *McKesson* "in all probability" passed the economic burden of the tax on to customers or because in-state drivers in *ATA* had not sought a refund of the taxes they paid (under a taxing scheme designed to accord them beneficial treatment) has absolutely no bearing on whether the refund of the unconstitutional taxes would impose an undue hardship on the States.

ity issue—the Court limited the effect of its decision two years earlier in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), which invalidated, on First Amendment grounds, a Pennsylvania statute authorizing State reimbursement to private sectarian schools for certain educational services provided by the schools. The hardships of which the Court was concerned in that case were not the State's, but rather those of the private schools that had provided services and incurred expenses in reliance on the constitutionally defective statute. 411 U.S. at 203-04. (Indeed, the State would have been relieved of a financial burden had the Court applied its decision on a retroactive basis.) Similarly, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court limited the retroactive effect of a decision holding unconstitutional a Louisiana statute permitting only property taxpayers to vote in elections called to approve the issuance of public utility revenue bonds. The hardship addressed by the Court was again not the State's but rather that which would have been suffered by cities and bondholders (who had relied on the state law) had the decision been applied retroactively. 395 U.S. at 706.¹⁷

Thus, in applying the inequity test, the Court has focused on whether hardship would befall parties or other individuals who did not have it within their power to rectify the situation by adopting the rule in question. The States of Florida and Arkansas clearly did have the

¹⁷ See also *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (decision holding the Bankruptcy Act of 1980 unconstitutional applied prospectively because of the substantial injustice and hardship that would otherwise be visited upon litigants who had relied on the statute); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (decision that city department's employee benefit plan violated Title VII of the Civil Rights Act of 1964, as amended, applied prospectively because of the "devastating" effect retroactivity could have "in large part on innocent third parties"—covered employees).

power to enact constitutional, nondiscriminatory tax statutes.

Moreover, even assuming the States could demonstrate that they would suffer an undue hardship if compelled to refund immediately all unconstitutionally collected taxes, it does not follow—as the Florida and Arkansas courts effectively concluded—that the wronged taxpayers should receive nothing.¹⁸ In appropriate cases, a State might—perhaps under guidelines prescribed by the legislature—craft a refund policy that minimizes the "inequity" the State might otherwise suffer. For example, a State might provide that the taxes unconstitutionally collected (plus an interest factor) could be claimed as a credit on the affected taxpayers' future years' tax returns.¹⁹

In summary, the Florida court ignored, and the Arkansas court misapprehended, all three of *Chevron's* tests. Their failure to analyze *Chevron* properly, if not rectified, could be used to sanction prospective-only application in respect of virtually all decisions declaring state tax statutes unconstitutional. Such a result would be pernicious—nullifying the Court's decisions in *Bacchus* and *Scheiner* and frustrating the policy underlying the Commerce Clause.

III.

The questions presented by this case are substantial and important not only because the Florida and Arkansas decisions threaten to eviscerate this Court's holdings in *Bacchus* and *Scheiner*, but also because the Florida and Arkansas cases are but recent examples of the States'

¹⁸ Obviously, the hardship suffered by the States in such an instance would be no greater than the hardship collectively suffered by the taxpayers from whom the taxes were unconstitutionally exacted.

¹⁹ Tatarowicz, *supra*, 41 Tax Lawyer at 143 & n.248. Alternatively, the taxes at issue could be refunded in installments. 41 Tax Lawyer at 143.

misconstruing both the requirements of the Commerce Clause and the standard set forth in *Chevron*. Indeed, during the past five years, there has been a vertiable wave of state court decisions in which discriminatory statutes have been found, in essence, to be unconstitutional on a prospective-only basis.

For example, the State of West Virginia is now contending on the remand of *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), appeal dismissed for want of final judgment, 107 S. Ct. 1949 (1987) (remand pending), that this Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco. Similarly, in *National Can Corp.*, the Supreme Court of Washington refused to give effect to, and refused to pay refunds under, this Court's decision in *Tyler Pipe Industries*.²⁰ See also *Penn Mutual Life Insurance Co. v. Department of Licensing and Regulation*, 162 Mich. App. 123, 412 N.W.2d 668 (1987), and *Metropolitan Life Insurance Co. v. Commissioner of Insurance*, 373 N.W.2d 399 (N.D. 1985), which both held that the Court's decision in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), invalidating a provision taxing foreign insurers, should apply on a prospective-only basis.²¹

²⁰ The Court's disposition of the *National Can* case last term notwithstanding, the Washington court's decision—and its analysis of *Chevron* (which the Arkansas court cited with approval in *ATA*)—underscores the need for the Court to articulate clear standards concerning the prospective-only issue.

²¹ For a list of other cases in which state courts have applied decisions that a tax is unconstitutional on a prospective-only basis, see Tatarowicz, *supra*, 41 Tax Lawyer at 117-18 n.89. Compare *American Trucking Associations, Inc. v. Goldstein*, 312 Md. 583, 541 A.2d 955 (1988) (overturning, based on *Chevron*, the State of Maryland's effort to postpone the effective date of the *Scheiner* decision for nearly a year); *American Trucking Association v. Kline*, No. 07-17-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988) (*Scheiner* applied retroactively); *American Trucking Associations, Inc. v. Con-*

These other cases—when viewed in conjunction with the cases at hand—vividly illustrate that the States, at best, misunderstand the balance that is to be struck in considering the retroactivity question and, at worst, have virtually no regard for the policy underlying the Commerce Clause or for the precedents of this Court. State after state has adopted what can be described as a “heads I win, tails you lose” approach to cases implicating the Commerce Clause's proscription on discriminatory tax statutes. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State then declares that the decision established a “new principle” and nimbly concludes that it should receive prospective-only application. As a result, all taxpayers (with the possible exception of the victorious litigant who in any event may have incurred substantial costs) lose.

Such adroit reading of precedent and deft, self-serving application of *Chevron* may enrich the particular State's fisc, but the results can hardly be said to foster the policy underlying the Commerce Clause. If not clarified, the decisions below might not only lead States to ignore Commerce Clause concerns but also discourage taxpayers from challenging clearly discriminatory tax statutes. These facts remain:

- The enactment of discriminatory taxes violates the Constitution.
- The collection of discriminatory taxes violates the Constitution.
- The retention of discriminatory taxes violates the Constitution.

Because the question of the refund of unconstitutionally imposed and collected taxes is one of remedy, it

way, [Vt.] State Tax Rep. (CCH) ¶ 200-306 (No. S-147-86WnC) (Vt. Super. Ct., Washington Co., Feb. 11, 1988), appeal docketed, No. 88-156 (Vt. Mar. 11, 1988) (*Scheiner* applied retroactively).

is properly addressed in the first instance by state courts. *Bacchus*, 468 U.S. at 277; *Scheiner*, 107 S. Ct. at 2847. The remand from this Court in such cases, however, invariably requires that the lower court's disposition of the remedy question be "not inconsistent with this opinion." 468 U.S. at 277; 107 S. Ct. at 2848. The wave of prospective-only holdings that have ensued fail the test of consistency—with respect both to the Commerce Clause and the Court's teaching in *Chevron*. It should be stopped.

IV.

Amicus Tax Executives Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron* standard, it may be appropriate for the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause.

Two terms ago, in *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court considered—and found constitutionally repugnant—the racially discriminatory use by prosecutors of peremptory challenges. Declaring that "[t]he time for toleration has come to an end," 479 U.S. at 323, quoting *United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982), the Court concluded that generally new rules for the conduct of criminal prosecutions will be applied retroactively to all pending or non-final cases even if they constitute a "clear break" with the past. 479 U.S. at 328. See L. Tribe, *American Constitutional Law* 31 n.26 (2d ed. 1988).

Although cases addressing the validity of discriminatory state tax statutes do not involve considerations of the same magnitude as those presented in criminal procedure cases, such cases do implicate a constitutional right—an interstate business's right under the Commerce Clause to be free from undue state-imposed burdens.

Thus, they involve rights different from, and indeed more significant than, the statute of limitations issue presented in *Chevron*.²²

In addition, unlike the other civil cases in which the retroactivity issue has been considered, the unsuccessful litigant in a discriminatory state tax case—the party who seeks to have the finding of unconstitutionality applied on a prospective-only basis (the State)—is the progenitor of the proscribed (unconstitutional) action. The States do have it within their power to enact constitutional tax statutes. This fact alone suggests that the States should be held to a higher standard in obtaining exceptions to the general rule of retroactivity. States should not be permitted to reap the benefits of discriminatory taxation while impeding interstate commerce. The States' checkered history in enacting, collecting, and refusing to refund unconstitutional taxes only underscores this conclusion. As this Court stated in *Griffith*, "[t]he time for toleration has come to an end." 479 U.S. at 323.

CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the courts below.

Respectfully submitted,

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²² See note 9, *supra*.

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JOSEPH F. SPANIO, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioner,

VS.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY
AND TRANSPORTATION DEPARTMENT, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, IDAHO, MONTANA, NORTH DAKOTA, TEXAS AND UTAH IN SUPPORT OF RESPONDENTS

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No. 88-192 and No. 88-325

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
*Respondents.***On Writ of Certiorari to the Supreme Court of Florida**AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
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AND TRANSPORTATION DEPARTMENT, et al.,
*Respondents.***On Writ of Certiorari to the Supreme Court of Arkansas****AMICUS CURIAE BRIEF OF THE STATES OF
CALIFORNIA, IDAHO, MONTANA, NORTH DAKOTA,
TEXAS AND UTAH IN SUPPORT OF RESPONDENTS****INTEREST OF AMICUS CURIAE**

The State of California on behalf of the California Franchise Tax Board submits this brief pursuant to Rule 36 as amicus curiae in support of respondents the State of Florida and the State of Arkansas. Rule 36.4 provides that California is not required to obtain the consent of the parties to file an amicus curiae brief.

The following States join California in this brief: Idaho, Montana, North Dakota, Texas and Utah.

While the State of California recognizes the importance of these cases to Florida and Arkansas, the concern of amicus curiae California reaches far beyond the resolution of *McKesson* and *American Trucking Associations*. Both cases present the Court with the opportunity to speak directly to the larger issue of under what circumstances must a state that enacts a tax that is subsequently determined to be unconstitutional be required to refund the taxes collected. Resolution of this larger issue will, of necessity, require the Court to decide upon and articulate the standard by which it will be determined whether a decision striking down a state tax as unconstitutional will be applied prospectively or retroactively. Of the two cases, this issue is most clearly presented in *American Trucking Associations* where the Court must decide whether to apply its decision in *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987), prospectively only.

SUMMARY OF ARGUMENT

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court established a three-pronged test for governing consideration of whether to impose a civil decision prospectively or retroactively. Statements in the briefs of amicus curiae for petitioners, notably the Committee On State Taxation (COST) and the Tax Executives Institute, Inc., (TEI) urge the Court to abandon the test established in *Chevron*. Instead, the Court is urged by COST and TEI to adopt new standards with respect to state tax statutes found to violate the Commerce Clause; specifically, those briefs urge the application of standards for criminal cases set forth in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

Amicus California believes the *Chevron* standard is still valid and should be applied in these cases, as well as in all cases where state tax statutes are found to be unconstitutional. Amicus California respectfully urges the Court to seize upon this opportunity to reaffirm the validity of *Chevron*, and to elaborate upon the application of the *Chevron* standard to civil cases such as these which involve state taxes found to be unconstitutional. Amicus

California also urges the Court to find that the first prong of the *Chevron* test is not a "threshold" or indispensable prerequisite to a finding of prospectivity, and to find that *Chevron* requires a balancing of all three prongs. Amicus California also urges that special recognition be given under *Chevron* to the role of taxes as the "life-blood" of the states.

ARGUMENT

THE *CHEVRON* STANDARD CONTROLS THESE CASES

No absolute rule of retroactivity prevails in the area of constitutional adjudication. *Linkletter v. Walker*, 381 U.S. 618, 628-629 (1965). Indeed, the Constitution neither prohibits nor requires retroactive effect. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). No "bright-line" rules have been articulated by the Court under which the retroactivity decision is made. However, in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), this Court set forth three general factors when dealing with the nonretroactivity question outside the criminal area:

"First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citations omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citations omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation omitted.] Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'" [Citation omitted.] 404 U.S. at 106-107.

A. *Chevron* Should Not Be Abandoned In Favor Of The *Griffith* Standard For Retroactivity In Civil Tax Cases

The Court in *Chevron* held that a decision specifying the applicable state statute of limitations in another context should not be applied retroactively because the decision overruled clear Circuit precedent on which the complaining party was entitled to rely, because the new limitations period had been occasioned by a change in the substantive law the purpose of which could not be served by retroactivity, and because retroactive application would be inequitable. 404 U.S. at 107-109. *Chevron* did not directly address the question of when retroactive effect should be given to a ruling of unconstitutionality. Amici TEI and COST openly advocate a course which would have this Court abandon the *Chevron* test in favor of a new standard with respect to state tax statutes found to be unconstitutional. The new standard proposed by TEI and COST is the one set forth in *Griffith v. Kentucky*, 479 U.S. 314 (1987). There the Court held a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U.S. at 328.

Amicus California urges that the *Chevron* standard should not be abandoned and specifically should be applied to civil tax cases which present constitutional issues. There is not the slightest hint in *Griffith* that the Court's newly enunciated standard for criminal cases applies to *civil* cases. Indeed, the *Griffith* opinion states in no uncertain terms that the area of civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*." 479 U.S. at 322, n. 8. Moreover, *Griffith* relied heavily upon *United States v. Johnson*, 457 U.S. 537 (1982), in formulating this new standard of retroactivity in criminal cases. The *Johnson* opinion also affirmed the continued vitality of the *Chevron* standard for civil cases by pointing out that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co. v. Huson*." 457 U.S. at 563.

Accordingly, the Court could not have been more clear in expressing in *Griffith* and *Johnson* its intention that a new standard was being created for criminal, but *not civil*, cases on the

issue of retroactive application. Nonetheless, while amicus TEI concedes that cases addressing the validity of discriminatory state tax statutes "do not involve considerations of the same magnitude as those presented in criminal procedures cases", it argues such cases "do implicate a constitutional right." Amicus TEI argues the presence of this constitutional right distinguishes these cases from the statute of limitations issue presented in *Chevron*. TEI Brief at 20. But TEI looks to a distinction without legal significance. Whether a constitutional right is in issue is *not* the focus of the retroactivity analysis. The issue, as it consistently has been addressed by the Court, is whether the issue involves a civil as opposed to a criminal case. *McKesson* and *American Trucking Associations* are indisputably civil cases. The fact these civil cases relate to constitutional issues is only one of a myriad of factors which the Court should examine and evaluate under the expansive parameters of the three factors discussed in *Chevron*.

Amicus COST argues the rationale of *Griffith* for abandoning the prospectivity doctrine in non-final criminal cases is as compelling in civil tax cases because "just as in criminal cases where substantial conceptual difficulties arose by not applying new rules retroactively, application of the prospectivity standards of *Chevron* has generated incompatible, unworkable rules and inconsistent principles which are often ignored at lower levels." COST Brief at 14. Exactly what these "incompatible, unworkable rules and inconsistent principles" are which COST claims warrant abandonment of the *Chevron* standard is not discussed by COST. Nor is it clear whether or why these problems exist only in the civil tax cases as opposed to all civil cases. COST apparently would have this Court categorically reject *Chevron* in all state tax cases, and perhaps even in all civil cases, as an expedient means of resolving what quite possibly are "problems" which exist only in COST's imagination.

The fact the Court has never before taken the opportunity to apply the *Chevron* factors to a civil tax case involving a violation of the Constitution has left some issues unresolved with respect to how those factors are to be applied. But clear guidance from the Court in these cases can resolve those open issues without taking

the draconian step of replacing the civil *Chevron* standard with the criminal *Griffith* standard.

B. The First *Chevron* Factor, That Of Whether A New Principle Of Law Is Established, Is Not A Threshold For Prospective Application

Under the first factor of *Chevron*, the decision to be applied nonretroactively should "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed. [citation omitted]." 404 U.S. at 106. Petitioners argue this first prong of *Chevron* is a threshold requirement for prospective application. McKesson Brief at 32, ATA Brief at 7. Amicus California disagrees, and urges the Court to interpret and clarify the *Chevron* test so as to require an examination and balancing of all three factors.

The Court has never held that the first factor of *Chevron* is a threshold requirement for prospectivity. In both *Chevron* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), the Court found all three *Chevron* factors militated against retroactivity, and thus did not specifically address the issue of what weight is to be given to any particular factor.¹ Amicus California urges the Court to adopt the view expressed by several Circuits that no single factor, including the

¹ Justice Stewart, author of the *Chevron* opinion, did state the issue of retroactivity "is not even presented unless the decision in question marks a sharp break in the web of the law" and "the issue is presented only when the decision overrules clear past precedent". *Milton v. Wainwright*, 407 U.S. 371, 381 n. 2 (1972) (Stewart, J., dissenting). However, *Milton* was a criminal (not civil) case, the majority did not address the retroactivity issue, and Justice Stewart did not even cite to *Chevron* in his dissent. Also, in *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982), Justice Blackmun stated in a footnote that in the civil context, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. However, once again, the statement was made in the context of a criminal (not civil) case.

first prong of *Chevron*, is determinative on the retroactivity question. That view was succinctly summarized by the Tenth Circuit in *Jones v. Consolidated Freightways Corp.* (10th Cir. 1985), where the court explained the application of the *Chevron* standard as follows:

"A proper assessment under *Chevron Oil* focuses upon the relative significance of the individual *Chevron* factors. It is not necessary that each factor compel prospective application. [Citations omitted]. While non-retroactivity generally depends upon the existence of past precedent, [citation omitted] 'the final determination involves pulling together the three factors for a careful balancing.' [Citation omitted.]" 776 F.2d at 1460, 1461.

Jones is consistent with the language of *Chevron* where the Court specifically stated that in cases dealing with the nonretroactivity question, it has "generally considered three separate factors", and concluded that "upon consideration of each of these factors" that prospective application was proper. *Chevron*, 404 U.S. at 106-107, emphasis added. Petitioners would interpret this language to mean that only where the first prong is satisfied would an examination under the second and third factors take place. Such an interpretation, however, is in direct conflict with the plain language of *Chevron* which speaks of considering not one, but three, factors. To interpret *Chevron* as petitioners do would nullify the need for a three-factor test and would relegate the important considerations of purpose and inequity, the second and third *Chevron* factors, to second class status, to be examined only if and when the Court has found under the first prong of *Chevron* that a new principle of law has been established.

Amicus California urges the Court not only to reject the "threshold" approach suggested by petitioners, but also to recognize that after considering and balancing all three factors, nonretroactivity may be supported by a finding under *only one* of the three *Chevron* factors. Such an approach was followed by the First Circuit in *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982), affirmed on other grounds, 462 U.S. 650 (1983), where the court found neither the first nor the second *Chevron* factors required nonretroactive application of the decision in issue. The

court in *Fernandez* then stated “[w]e might still find retroactivity barred if it would produce substantially inequitable results, the third *Chevron Oil* factor.” 681 F.2d at 52 (emphasis added). Similarly, the Tenth Circuit in *Jones v. Consolidated Freightways Corp.*, *supra*, 776 F.2d at 1460 remarked, “[a] proper assessment under *Chevron Oil* focuses upon the relative significance of the individual *Chevron* factors. It is not necessary that each factor compel prospective application.”² The Eleventh Circuit reached the same conclusion in *Ackinclose v. Palm Beach County, Fla.*, 845 F.2d 931, (11th Cir. 1988), where the court stated, at page 935, “[i]n the final component of the *Chevron* analysis we are instructed that if retroactive application of a decision of the Court would produce substantial inequitable results, a holding of non-retroactivity is implied.”³ This approach followed by the First

² Citing to *Mitchell v. City of Sapulpa*, 857 F.2d 713, 716 (10th Cir. 1988), petitioner McKesson states the Tenth Circuit is one of the federal Circuits which has “expressly viewed *Chevron*’s first prong as a threshold test that must be met before the presumption of retroactivity can be overcome.” McKesson Brief at 34, n.9. Amicus California disagrees with this statement. Page 716 of *Mitchell*, which is cited to by petitioner, discusses the applicability of the *Johnson* standard for retroactivity in criminal cases. The court at page 717 of *Mitchell* then concludes the *Chevron* (not *Johnson*) standard is to be applied, and goes on to examine each of the three *Chevron* factors. Nowhere in *Mitchell* does the Tenth Circuit state that the first prong of *Chevron* is a threshold test, and such a reading of *Mitchell* is inconsistent with *Jones*. While the Tenth Circuit in *Jones* did comment that nonretroactivity “generally” depends upon the existence of clear past precedent, *Jones* explicitly states the final determination involves “pulling together the three factors for a careful balancing,” and explicitly states that it is not necessary for each factor to compel prospective application. 776 F.2d at 1460-1461.

³ Citing to *Acoff v. Abston*, 762 F.2d 1543, 1548, n.6 (11th Cir. 1985) Petitioner McKesson stated the Eleventh Circuit is one of the federal Circuits which has “expressly viewed *Chevron*’s first prong as a threshold test that must be met before the presumption of retroactivity can be overcome.” McKesson Brief at 34, n.9. Amicus California disputes this statement. The footnote reference in *Acoff* clearly states the court is applying the *Johnson*, not *Chevron* standard, so any reference in *Acoff* to

Circuit in *Fernandez*, the Tenth Circuit in *Jones*, and the Eleventh Circuit in *Ackinclose* not only rejects the first prong of *Chevron* as a “threshold” test, but also recognizes, consistent with *Chevron*, that the prospectivity question requires an analysis of all three factors. Under this approach, which amicus California urges the Court to adopt, prospective application may be found proper upon a finding of a single *Chevron* factor.

C. The First Prong Of *Chevron* Should Be Liberally Interpreted In Favor Of A Finding Of A New Principle Of Law

The first prong of *Chevron* looks to whether the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Chevron*, 404 U.S. at 106. Amicus California suggests that this prong should be read to militate against retroactive application, and in favor of prospective application, where the decision disapproves a practice this Court has arguably sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. *United States v. Johnson*, *supra*, 457 U.S. at 551; *Solem v. Stumes*, 465 U.S. 638, 464 (1984); see e.g., *Gosa v. Mayden*, 413 U.S. 665, 673 (1973) (plurality opinion) (applying nonretroactively a decision that “effected a decisional change in attitude that had prevailed for many decades”).

how the *Chevron* standard should be applied is dicta. That dicta is clearly inconsistent with the subsequent opinion of the Eleventh Circuit in *Ackinclose* which states that all three *Chevron* factors are relevant, and that it is “implied” from *Chevron* that a holding of non-retroactivity can be based solely upon a finding under the third prong of *Chevron* that retroactive application would produce substantial inequitable results. *Ackinclose*, 845 F.2d at 935.

D. The Second Prong Of *Chevron* Should Be Read To Recognize That The Purpose Of The Commerce Clause Would Not Be Furthered By Retroactive Application In State Tax Cases

The second prong of *Chevron* requires an examination of "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. at 107. Petitioner McKesson argues the Florida Supreme Court's decision will further the Commerce Clause's "protections of the national common market only if the decision is retroactive." McKesson Brief at 37. Similarly, petitioner ATA argues retroactivity is necessary to encourage state officials "to heed the national interests in interstate free trade instead of provincial local concerns that favor in-state over out-of-state taxpayers." ATA Brief at 29. What is not made clear by either petitioner is why *prospective* application does not sufficiently further these goals.

This country had "its immediate origin in the necessities of commerce" and "the entire purpose for which the delegates first assembled at Annapolis was to devise means for the uniform regulation of trade." *Gibbons v. Ogden*, 22 U.S. 11 (9 Wheat), 6 L.Ed. 23, 26 (1824). It was this void which prompted Alexander Hamilton to point out that "[t]he want of a power to regulate commerce" was one of the defects of the Articles of Confederation. Hamilton, *The Federalist* No. 22. But retroactivity is not needed to achieve these goals of "a uniform and steady system" of commerce. *Gibbons*, *Ibid*. Prospective application of this Court's decisions in *Scheiner* (*supra*) 107 S.Ct. 2829, and *Baccus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) will adequately preclude state enactments that unconstitutionally discriminate against interstate commerce. Whatever chill was imposed on interstate trade is in the past. *National Can Corp. v. Dept. of Revenue*, 749 P.2d 1286 (Wash. 1988), appeal dismissed & Cert. denied, 108 S.Ct. 2030 (1988). "The actual existence of a statute, prior to . . . [a determination of unconstitutionality] . . . is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot*

County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940).

Petitioner ATA argues that limiting *Scheiner* to prospective application would do nothing to remedy the unconstitutional discrimination against out-of-state taxpayers that has already occurred. ATA Brief at 24. But this will be the situation in every case, and ATA essentially asks this Court for nothing less than a rule which would require retroactivity in *all* state tax cases. Obviously such a rule would be totally inconsistent with the Court's approach in *Chevron* where a three-factor test was set forth for reviewing the retroactivity issue. ATA's argument nullifies the *Chevron* test.

Petitioners ATA and McKesson also assert that retroactive application is required in order to provide an incentive for states to not enact, or reenact, unconstitutional levies. ATA Brief at 27, McKesson Brief at 40. But once again, what petitioners ask for is a rule which would require retroactive application in *all* Commerce Clause state tax cases. Retroactive application might be appropriate where a taxpayer can demonstrate a course of conduct by a state or states which leads to the inescapable conclusion that nothing less than retroactive application will deter imposition of an unconstitutional levy. But it cannot be assumed that retroactive application is required because states, absent retroactive application, will not have any incentive to enact constitutional statutes. Indeed, petitioner McKesson admits, "[p]resumably, states usually do not intend for their tax legislation to violate the federal Constitution." McKesson Brief at 39. If it is assumed states do not intend for their tax legislation to violate the federal Constitution, then there is no need to require retroactive application to "encourage" states to enact constitutional statutes.

E. The Third Prong Of *Chevron*, Balancing The Equities, Should Recognize That Taxes Are The Life-Blood Of The States

Under the third *Chevron* factor, a court must weigh "the inequity imposed by retroactive application." 404 U.S. at 107. "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our

cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969). The equities in state tax cases favor prospectivity.

The two cases currently before the Court inject into the third *Chevron* factor an additional element not found in civil cases in general. That additional element is the importance of taxes to the states. Taxes "are the life-blood" of government. *Bull v. United States*, 295 U.S. 247, 259 (1935); *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 523 (1984). Taxes also occupy a special place in the area of judicial review. "In resolving constitutional challenges to state tax measures this Court has made it clear that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' [citations omitted.] Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures." *Austin v. New Hampshire*, 420 U.S. 656, 661-662 (1975).

Amicus TEI argues that under a "properly framed inequity test", the examination should be whether "undue hardship" to the states, as opposed to "hardship", would result from retroactive application of a decision. TEI argues that under this analysis a different result obtains, for the "hardship" of which the states might complain is one of their own making, i.e., "the result of their own unconstitutional acts". TEI Brief at 15.

TEI's position finds no support in the law. Just as it would have produced "substantial inequitable results" in *Chevron* to have held the respondent therein "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him, so would it produce substantial inequitable results to hold in these cases that a state must return taxes collected at a time it could not have known the legal basis upon which it collected those taxes would at some later date be declared unconstitutional. TEI essentially advocates for a rule which looks to the burden upon the taxpayer and ignores the burden upon the state on the rationale that the state's burden is irrelevant to *Chevron's* equity analysis because such burden is of the state's own making. The "hardship" to Florida and Alabama is no more "the result of their own unconstitutional acts" than would be the

act of any party acting under color of a law later declared unconstitutional. The funds collected by a state under a tax enacted in good faith by its legislature to meet the growing burdens of state government are not for any private benefit or profit. They accrue to the public benefit for public purposes.

Statutory or even court made rules of law "are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon II*). A consequence of this "fact of life" is that states rely upon statutory and court made rules of law in making decisions affecting revenue and, for this reason, financial hardship may result from retroactivity. The financial hardship to a state associated with retroactivity must be a major component of the *Chevron* equity analysis.

It is well established that a court may look to fiscal hardship and revenue effect when examining the retroactivity issue. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*) the Court held on June 28, 1971 that a Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. In *Lemon II*, the Court permitted Pennsylvania to reimburse nonpublic sectarian schools for services provided before June 28, 1971 when *Lemon I* was decided. 411 U.S. at 193-209. The Court in *Lemon II* recognized that the expenses incurred by the schools "in reliance on the state statute inviting the contract made and authorizing reimbursement for past services performed by the schools" offset "the remote possibility of constitutional harm" which would result from permitting Pennsylvania to keep its bargain with the schools. 411 U.S. at 203. The Court recognized in *Lemon II* that to deny the church-related schools any reimbursement for their services "would impose upon them a substantial burden which would be difficult for them to meet." 411 U.S. at 204.

Thus, the protection of fiscal interests is clearly a major consideration in any retroactivity analysis. See also *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722 (1978) ("Retroactive liability could be devastating for a pension

fund.”); *Florida v. Long*, 487 U.S. ____ (1988), 108 S.Ct. 2354, 2361-2363; *Camden I. Condominium Ass’n Inc. v. Dunkle*, 805 F.2d 1532, 1535 (11th Cir. 1986), cert. den. 107 S.Ct. 3266 (1987) (“the risk of insolvency for local governments, the risk of deep cuts in government services necessary to innocent citizens, and the risk of overtaxing innocent taxpayers are critical inquiries in this case.”) This fiscal consideration is of paramount importance when the retroactivity issue involves state taxes, the state’s “life-blood”, which are collected and spent and then subsequently found to be unconstitutional.

CONCLUSION

For the reasons stated, this Court should reaffirm the validity of *Chevron*, and elaborate upon the application of the *Chevron* standard to civil cases which involve state taxes found to be unconstitutional.

DATED: February 21, 1989

Respectfully submitted,

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FEB 21 1989

JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

McKESSON CORPORATION,
v. *Petitioner,*

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

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MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY
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On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE NATIONAL CONFERENCE OF
STATE LEGISLATURES, NATIONAL LEAGUE OF
CITIES, NATIONAL GOVERNORS' ASSOCIATION,
U.S. CONFERENCE OF MAYORS,
NATIONAL ASSOCIATION OF COUNTIES, AND
INTERNATIONAL CITY MANAGEMENT ASSOCIATION;
JOINED BY THE MULTISTATE TAX COMMISSION
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), states the appropriate test for determining the availability of a tax refund as a remedy for a violation of the Commerce Clause.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-192 and 88-325

McKESSON CORPORATION,
v. *Petitioner,*DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
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Respondents.

On Writ of Certiorari to the Supreme Court of Florida

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v. *Petitioners,*MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY
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Respondents.

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BRIEF OF THE NATIONAL CONFERENCE OF
STATE LEGISLATURES, NATIONAL LEAGUE OF
CITIES, NATIONAL GOVERNORS' ASSOCIATION,
U.S. CONFERENCE OF MAYORS,
NATIONAL ASSOCIATION OF COUNTIES, AND
INTERNATIONAL CITY MANAGEMENT ASSOCIATION;
JOINED BY THE MULTISTATE TAX COMMISSION
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici National Conference of State Legislatures, National League of Cities, National Governors' Association, U.S. Conference of Mayors, National Association of Counties, and International City Management Association are organizations whose members include state, county, and municipal governments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission is the official administrative agency of the Multistate Tax Compact. The Compact has been entered into by eighteen States and the District of Columbia as full members; ten additional States have joined the Commission as associate members.¹ The Commission has a vital and continuing interest in state tax disputes that may dramatically affect the administration of state tax systems.

These cases concern the effect of the invalidation of state tax statutes under the Commerce Clause. In both cases, petitioners brought suits in state court challenging the constitutionality of the taxes; in both cases the state supreme court ultimately held that the taxes discriminated against out-of-state taxpayers in violation of the Commerce Clause. In both cases the petitioners then demanded full refunds of the taxes collected during the period that the unconstitutional taxing schemes were in effect—claims that in each case ran into the hundreds of millions of dollars. These demands were rejected by both courts below.

¹ The current full members are Alaska, Arkansas, California, Colorado, the District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, New Jersey, Ohio, Pennsylvania, and Tennessee. This brief should not be read to reflect the views of any member State that files a separate brief in this case.

Amici and their members have a profound practical interest in the refund rules that the Court will address in these cases. States and local governments draw much of their revenue from the taxation of entities that are engaged in interstate commerce. Yet, as the Court has repeatedly noted, its Commerce Clause jurisprudence is at times confusing and unpredictable; that problem is compounded by the changing nature of many state economies, which poses novel problems for state and local taxing authorities. These factors make it inevitable that taxing schemes occasionally will be found to run afoul of the Commerce Clause. If refunds for these violations are too readily available, state and local governments will face not only revenue shortfalls but also unexpected and potentially ruinous liability. At the same time, the prospect of disruptive refund liability will discourage States and local governments from tapping constitutionally permissible sources of funds.

Because *amici* have special expertise in tax litigation in state courts, and because they will be directly affected by the Court's decision here, they submit this brief to assist the Court in the resolution of these cases.²

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioners in both of these cases assume that the availability of a refund is controlled by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and they accordingly devote virtually all of their arguments to a simple application of the three *Chevron* factors. But in doing so, petitioners skip over a more fundamental question: whether *Chevron* applies at all in cases against state governments brought in state courts pursuant to state causes of action. Questions of remedy and retroactivity that arise in lawsuits based on state law are, after all,

² The parties have consented to the filing of this brief pursuant to Rule 36 of the Rules of this Court. Their letters of consent have been filed with the Clerk of the Court.

typically resolved by state courts according to their own rules. So far as retroactivity is concerned, "the choice for any state may be determined by the juristic philosophy of the judges of her courts" (*Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365 (1932)), and this Court generally has left it to state courts to formulate remedies for state violations of the federal Constitution's Equal Protection and Supremacy Clauses. Against this background, petitioners plainly must shoulder the burden of establishing that use of a federal retroactivity test imposed by this Court—and the *Chevron* test in particular—is somehow compelled by federal law.

1. In our view, petitioners have not carried either part of their burden. They have failed even to attempt to demonstrate the propriety of using the *Chevron* test in these cases. Certainly, nothing in *Chevron* itself—a case involving a federal court dispute between private parties over the meaning of federal maritime law—suggests that its standard should control in suits against state governments brought in state courts. In fact, there are compelling reasons to make retroactivity the exception in such cases. "[O]ne of the first principles of constitutional adjudication" is "the basic presumption of the constitutional validity of a duly enacted state or federal law" (*Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (plurality opinion) (citation omitted)); holding States retroactively liable when their taxing officials relied on such laws in good faith "could seriously undermine the initiative of state legislative and executive officials alike." *Id.* at 207-208.

Beyond that, the imposition of retroactive liability on state and local governments may—and in these cases would—place dramatic and unexpected burdens not on wrongdoers, as in cases where such liability is imposed for violations of law by private parties, but on the "blameless and unknowing taxpayers" who ultimately

would have to foot the bill. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Of course, we recognize the force of petitioners' argument that persons injured by a State's violation of the Constitution should be made whole. But this consideration bears little weight when the violation involves the Commerce Clause, which does not create rights that are personal to the injured party.

2. More fundamental than the defects in the standard they offer is petitioners' failure to provide constitutional considerations justifying the creation of *any* federal refund rule by this Court for use in state proceedings. A federal rule of retroactivity is not necessary to deter constitutional violations; state courts can be trusted to apply their normal refund rules in a nondiscriminatory manner in adjudicating Commerce Clause claims, and to provide relief when state legislatures attempt to evade the requirements of the Clause.

At the same time, petitioners have no constitutional right to be "made whole" for the States' violations of the Commerce Clause. The Clause does not give petitioners an absolute entitlement to operate in interstate commerce without restriction; instead, it allocates power over commerce between the federal and state governments. The benefits that petitioners derive from the national free trade area that prevails in the absence of congressional action is incidental. The Clause thus was not designed to protect personal rights. And because the Clause does not secure any personal right of petitioners, it is a matter of indifference to the Constitution whether, once barriers to commerce are removed, a refund also is made available.

In any event, even if the Commerce Clause is understood to create rights that are in some sense personal to petitioners, it entitles them to no more than non-discrimination. As in the equal protection area, a viola-

tion of this right may be cured by a mandate of future equal treatment; that mandate need not be extended into the past.

ARGUMENT

THE CHEVRON TEST SHOULD NOT CONTROL THE AVAILABILITY OF REFUNDS IN THESE CASES

A. The Constitution Does Not Require The Payment Of Tax Refunds When A State Tax Statute Is Struck Down As Unconstitutional

1. At the outset, it is clear that the Constitution does not, as a general rule, require the use of remedies for constitutional violations that will set aside completed transactions or disturb settled patterns of conduct. “[T]he federal Constitution has no voice upon the subject’ of retrospectivity” (*United States v. Johnson*, 457 U.S. 537, 542 (1982), quoting *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)), and the Court’s holdings in recent years accordingly “have emphasized that the effect of a given constitutional ruling on prior conduct ‘is subject to no set “principle of absolute retroactive invalidity.”’” *Lemon v. Kurtzman*, 411 U.S. 192, 198-199 (1973) (*Lemon II*) (citations omitted). See *Linkletter v. Walker*, 381 U.S. 618, 624 (1965).

The Court has applied this understanding in a variety of settings, declining to give retroactive effect to rulings involving a number of constitutional provisions. See, e.g., *Lemon II* (First Amendment); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (Article III); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (separation of powers); *Connor v. Williams*, 404 U.S. 549, 550-551 (1972) (Equal Protection Clause); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 213-214 (1970) (same); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (same). See also *Caban v. Mohammed*, 441 U.S. 380, 416 (1979) (Stevens, J., dissenting). The

Court has similarly declined to disturb completed transactions or to require full retroactive effect when implementing decisions that involve important federal statutory guarantees, such as the Voting Rights Act (see *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969)); Title VII of the Civil Rights Act of 1964 (see *Florida v. Long*, 108 S. Ct. 2354 (1988); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 722-723 (1978)); and 42 U.S.C. § 1981 (see *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987)).

2. Citing two *Lochner*-era decisions—*Carpenter v. Shaw*, 280 U.S. 363 (1930) and *Ward v. Love County*, 253 U.S. 17 (1920)—the American Trucking Association (ATA) petitioners nevertheless suggest (Br. 28) that the Constitution, of its own force, mandates the payment of refunds when state taxes are collected under a scheme that subsequently is found to be unconstitutional.³ The

³ Petitioner McKesson argues (Br. 24-27) that this Court’s holdings mandate the payment of refunds as a remedy for unconstitutional taxes. With the arguable exceptions of *Carpenter* and *Ward*, however, none of the cited cases even remotely supports such a proposition. Several simply invalidated state taxes under the Commerce or other Clauses. *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940). Others held that a taxpayer whose property is overassessed in violation of the Equal Protection Clause may seek reduction of its assessment as a remedy, and cannot be obligated to seek relief in the form of a higher assessment for other taxpayers (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)), or that a State may remedy an equal protection violation by raising taxes on the favored class (*Montana Nat’l Bank v. Yellowstone County*, 276 U.S. 499 (1928)). *Atchison, T. & S.F. R.R. v. O’Connor*, 223 U.S. 280, 287 (1912), was a refund action brought in federal court; the Court noted that the State permitted actions for taxes mistakenly paid and “presume[d] that a judgment [of unconstitutionality] in the present action would satisfy the [state] law.” And *Iowa-Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239, 247 (1931), can best be read as standing only for the proposition that “a taxpayer who has been

relatively short shrift that petitioners devote to what should be a dispositive argument, however, suggests that they have some doubt about the continuing vitality of these decisions. That doubt is well-placed.

Even at the time they were decided, there was room to question what the Court actually held in *Carpenter* and *Ward*. Language in decisions rendered immediately prior to *Ward* suggested that state sovereign immunity could be asserted to preclude federal constitutional claims in state court. See, e.g., *Palmer v. Ohio*, 248 U.S. 32, 34 (1918) ("The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States"); *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911) (addressing a Fourteenth Amendment claim brought in state court, Court observed that "without [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever"). Indeed, in *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929), decided nine years after *Ward* and one year before *Carpenter*, the Court enjoined the collection of a Louisiana tax asserted to violate the Equal Protection Clause because state law would not allow for a refund if the tax ultimately were held to be unconstitutional, even where the taxpayer paid "under both protest and compulsion" (*id.* at 815); the Court's conclusion that this absence of a state remedy posed the risk of irreparable injury to the taxpayer (*ibid.*) certainly suggested that the Constitution would not of its own force mandate payment of a refund.

The years since *Carpenter* and *Ward* were decided have been no kinder to the decisions. Except in *Carpenter* itself

subjected to discriminatory taxation through the favoring of others" cannot, as his only remedy, "be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." That is the proposition for which *Iowa-Des Moines* has since been cited. See *Allegheny Pittsburgh Coal Co. v. Commission*, No. 87-1303 (Jan. 18, 1989), slip op. 9-10.

(which relied on *Ward*), this Court has never cited either decision for the proposition that States must make refunds available for taxes exacted in violation of the Constitution.⁴ To the contrary, the Court in *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), expressly left it to a state court to determine the availability of a refund remedy after a state tax statute was invalidated under the Supremacy Clause (*id.* at 196-197)—precisely the constitutional violation at issue in *Carpenter*. Indeed, in recent years the Court has repeatedly declined to order refunds in cases striking down state taxing statutes under the Commerce Clause. Instead, the Court has remanded the cases to the state courts for a determination of the availability of refunds—a course the Court followed in both *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847-2848 (1987), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-277 (1984), the decisions upon which the separate petitioners here relied in bringing their Commerce Clause challenges. See also *Tyler Pipe Industries v. Washington Dept. of Revenue*, 107 S. Ct. 2810, 2822 (1987). Such remands would hardly have been necessary had the Constitution of its own force required the payment of refunds.⁵

⁴ ATA petitioners note (Br. 28) that *Carpenter* and *Ward* were cited several years ago by the Fifth Circuit (*United States v. Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981)). That decision, however, involved an action against the State by the United States, which is not subject to the defense of state sovereign immunity.

⁵ In fact, giving *Carpenter* and *Ward* the reading contended for by petitioners would be inconsistent with the modern understanding of state sovereign immunity. It is true that some cases, such as *Carpenter*, *Ward*, and *General Oil Co. v. Crain*, 209 U.S. 211 (1908), may be read to support the proposition that state sovereign immunity cannot be asserted in state court as a bar to a claim grounded on the federal Constitution. The cases we cite above, however, point in the other direction. See *Palmer*, 248 U.S. at 34; *Hopkins*, 221 U.S. at 642. See also *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883). And the Court's more recent decisions

B. State Courts Are Not Obligated To Use The *Chevron* Test To Determine The Availability Of Tax Refunds

The conclusion that the Constitution does not compel a refund is not the end of these cases, of course; it leaves the question how to decide whether refunds are available. The petitioners in both of these cases, however, offer an assumption in place of an answer to this question: they ground virtually their entire arguments on the bald assertion that the retroactivity test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), governs the availability of a refund when a state tax is invalidated as unconstitutional. They accordingly devote the vast bulk of their briefs to an analysis of the three *Chevron* factors. But in undertaking this inquiry, petitioners skip over a more fundamental question—whether *Chevron* applies at all to suits in state court that, like the ones in these cases, involve state causes of action. The ATA petitioners assume without discussion that *Chevron* controls the outcome; petitioner McKesson simply asserts (Br. 31) that *Chevron* must be applied in cases involving the federal Constitution, even when those cases are brought in state court pursuant to state refund statutes.

under the Eleventh Amendment support the latter view. The Court has made it clear that the Amendment bars federal courts from entertaining actions against States seeking refunds for the unconstitutional collection of taxes. See *Edelman v. Jordan*, 415 U.S. 651, 668-669 (1974); *Kennecott Copper Co. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944). “[T]he significance of this Amendment,” the Court has added, “lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III of the Constitution.” *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984)). See *Pennhurst*, 465 U.S. at 98-99. By ratifying the Constitution, the States thus did not consent to the assertion against them of constitutional claims in federal court; it is unclear why, by the same ratification, they should be deemed to have waived the fundamental protection of sovereign immunity in their own courts. See generally *American Trucking Ass'n, Inc. v. Conway*, 508 A.2d 408 (Vt. 1986), cert. denied, 107 S. Ct. 3262 (1987).

There is no reason, however, why this should be so. *Chevron* itself involved a nonconstitutional federal claim that had been brought in federal court. See 404 U.S. at 98-100. The decisions relied upon by the *Chevron* Court in formulating its retroactivity standard likewise all involved federal causes of action litigated in federal court,⁶ as have the civil cases in which the Court has applied *Chevron* since 1971.⁷ On its face, then, the *Chevron* test is most naturally read as stating a rule of federal common law that governs the remedies awarded by the federal courts in federal lawsuits. Petitioners do not explain why the *Chevron* standard should be extended beyond that category of cases.⁸

⁶ See *Hanover Shoe, Inc. v. United States Shoe Machinery Corp.*, 392 U.S. 481 (1968) (federal antitrust action); *Linkletter v. Walker*, 381 U.S. 618 (1965) (federal habeas corpus); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (federal action under Equal Protection Clause); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (action under Voting Rights Act); *England v. State Board of Medical Examiners*, 375 U.S. 411 (1964) (federal abstention rules); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) (federal res judicata rules).

⁷ See *Saint Francis College*, 107 S. Ct. at 2025; *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621 (1987); *Northern Pipeline*, 458 U.S. at 87-88. See also *Long*, 108 S. Ct. at 2359; *Norris*, 463 U.S. at 1105-1107; *Manhart*, 435 U.S. at 722-723. Cf. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1306 (1986) (Powell, J., dissenting).

⁸ The Court has departed from *Chevron* in the criminal area, holding that a new constitutional rule should be applied to all cases pending on direct review—but not, evidently, to cases in which final judgment already had been entered—at the time the rule was adopted. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); compare *Allen v. Hardy*, 478 U.S. 255 (1986). In adopting this approach, the Court has pointed to considerations derived from Article III of the Constitution, reasoning that, once a new rule of criminal procedure is announced, “the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review”; “selective application of new rules violates the principle of treating similarly situated defendants the same.” *Griffith*, 479 U.S.

In fact, in our view there are compelling reasons for this Court *not* to mandate use of the *Chevron* test by state courts in circumstances like those presented here—where the plaintiffs are seeking remedies from state governments pursuant to state refund procedures for violations of the Commerce Clause. If the Court believes that a federal rule governing remedy is necessary in such cases, proper solicitude for the character of state governments and an appreciation of the nature of the Commerce Clause suggest that a refund should be mandated—as a matter of federal law—only when the unconstitutionality of the taxing statute is plain. But we believe that there is no need for this Court to impose its own rule of retroactivity; as in other settings, questions of remedy are best left to the state courts to resolve as a matter of state law. We address these points in turn.

1. *The Chevron test fails to take into account the special nature of the government defendant.*

Despite the amount of space they devote to the *Chevron* test, the ATA petitioners recognize (Br. 12-13) that another standard may be appropriate to govern the availability of tax refunds, although the test they offer would establish a rule of absolute retroactivity when a governmental entity is held to have violated the Commerce Clause. While petitioners are correct in suggesting that

at 323. See *United States v. Johnson*, 457 U.S. 537, 546-548, 555 (1982). These considerations plainly do not mandate the award of refunds here. Both sets of petitioners obtained the benefit of the Commerce Clause rules for which they contended: the unconstitutional taxes were invalidated. Indeed, the Arkansas Supreme Court in *ATA* gave petitioners the benefit of a new constitutional rule announced in *Scheiner*, a decision rendered while *ATA* was pending on direct review. *Griffith* plainly does not speak to the further question of remedy in Commerce Clause litigation such as that involved here. In any event, it hardly need be added that the federal interest in freeing persons who were incarcerated in violation of the Constitution is very different from the considerations determining the availability of a refund remedy in a civil lawsuit.

a departure from *Chevron* is appropriate, we believe that their proposed standard draws precisely the wrong lesson from this Court's decisions.

The ATA petitioners base their alternative standard on *Owen v. City of Independence*, 445 U.S. 622 (1980), which they read to support the proposition that governmental entities always should be required to make full recompense for constitutional injuries. But *Owen* is inapposite here. There, the Court held only that a municipality could not assert good faith immunity as a bar to suit under 42 U.S.C. § 1983. The question in *Owen* was “essentially one of statutory construction” (445 U.S. at 635), and was resolved by looking to the history and purposes of Section 1983 (see *id.* at 635-636, 640-650, 657). See also *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). The Court thus held in *Owen* that, for purposes of amenability to suit, municipalities should be treated *identically* to private entities. See 445 U.S. at 639, 640. That holding plainly falls far short of a conclusion that governments have *special* obligations to pay refunds or offer other forms of retroactive remedies in circumstances where private parties would not be liable for that relief.⁹

In fact, in a setting that is analogous to the one here—where the issue involved remedy rather than amenability to suit—the Court made it clear that the status of the defendant as a governmental entity provides special fac-

⁹ It is worth noting that a Section 1983 action for a refund is very likely unavailable in these cases. Money damages may not be awarded against States in Section 1983 actions in federal court. See *Quern v. Jordan*, 440 U.S. 332 (1979). The Court recently heard arguments on the question whether States are “persons” who may be sued under Section 1983 in their own courts, *Will v. Michigan State Police*, No. 87-1269 (argued Dec. 5, 1988); as we explain in our brief in that case, we believe that they are not. In any event, as we note below (at 22-23), there is serious doubt that violations of the Commerce Clause are cognizable under Section 1983.

tors cutting *against* the undoing of settled transactions as a remedy, at least where the constitutional standard governing liability was doubtful:

Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fail. In our view, appellants' position could seriously undermine the initiative of state legislative and executive officials alike. Until judges say otherwise, state officers * * * have the power to carry forward the directives of the state legislature.

Lemon II, 411 U.S. at 207-208 (plurality opinion). The *Lemon* Court therefore refused to set aside transactions that the State had entered into with private parties in violation of the Establishment Clause. In the absence of compelling constitutional considerations mandating retroactivity (*see id.* at 201-203), the Court added that "[w]e do not engage lightly in post hoc evaluation of such political judgment, founded as it is on 'one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law'" (*id.* at 208; quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60 (1973)); "absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Id.* at 208-209.

Other, related considerations reinforce the conclusion that governmental units pursuing the public's business should receive more solicitude in the formulation of remedies than private entities pursuing private ends. The ATA petitioners demonstrate a profound misunderstanding of the fiscal realities facing state and local governments when they cavalierly suggest that States found liable for refunds may suffer "at most inconvenience" (Br. 35) and that "the refunds can be financed by new tax

levies" (Br. 37). In a time of almost universal budget deficits and changing economies (*cf.* Academy for State and Local Gov't, *Where Will the Money Come From: Finding Reliable Revenue for State and Local Governments in a Changing Economy* (1986)), it is hardly a simple matter for a State or a local government suddenly to make unexpected outlays of hundreds of millions of dollars. Pointing to these considerations, Justice Powell, writing for five Justices in *Norris*, concluded that the imposition of retroactive monetary liability on a State was—*Owen* notwithstanding—inappropriate in an action under Title VII.

Noting that "the cost [of retroactive relief in *Norris*] would fall on the State of Arizona," and that "[p]resumably other state and local governments also would be affected directly" by the Court's decision, the Court explained: "Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial financial deficits. Income, excise, and property taxes are being increased." Because the illegality of Arizona's conduct had not been settled until the decision in *Norris* itself, the Court saw "no justification * * * to impose this magnitude of burden retroactively on the public." 463 U.S. at 1106-1107. *See id.* at 1110 (O'Connor, J., concurring). *Cf. Long*, 108 S. Ct. at 2362-2363.¹⁰

These observations point up a central difference between liability imposed on public, as opposed to private,

¹⁰ Indeed, dissenting in *Scheiner*, Justice O'Connor noted the reliance interest that States have in expected sources of revenue; specifically pointing to the Arkansas tax at issue here, Justice O'Connor explained that Arkansas "opened its highways to the heaviest trucks only upon the understanding that it might collect sufficient revenue from those trucks by means of flat taxes to compensate for the damage they do to its roads. If this flat tax is also unconstitutional, then Arkansas is left with the damage but without the taxes." 107 S. Ct. at 2849 (O'Connor, J., dissenting). The disruption to the State's finances obviously will be compounded many-fold if invalidation of the tax is combined with retroactive liability.

defendants. When a private party acts to further its own ends in an area where the law is unsettled, there is no inequity in holding it fully liable if it is found to have violated the law; doing so will simply require it to bear the costs that it incurred in pursuit of its private purposes. When a State or a local government is held liable, in contrast, the ultimate burden falls not on a wrongdoer but on "the shoulders of blameless or unknowing taxpayers" (*Fact Concerts*, 453 U.S. at 267) in the form of higher taxes or—perhaps more likely, given strapped state treasuries—reduced benefits. Cf. *ibid.*; *id.* at 271. At least in the Commerce Clause context, it is no answer to this that "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated" (ATA Br. 34, quoting *Owen*, 445 U.S. at 655). As we explain more fully below (at 21-23), the Commerce Clause does not create rights that are personal to the taxpayer; instead, it allocates power between the national and state governments. A Commerce Clause violation therefore does not deprive an injured party of something to which it was "entitled" in the same sense as does a due process violation of the sort at issue in *Owen*. The balance therefore tips in favor of the public and against the private interests.

2. The availability of a refund is a question of remedy that should be settled by state courts as a matter of state law.

a. The considerations outlined above suggest that *Chevron* should not govern in these cases. Rather than create a new rule of retroactivity or remedy, however, the Court can best reconcile the competing interests here by allowing the state courts to determine the availability of a refund according to state law. As a general matter, after all, questions of remedy that arise in state causes of action are resolved by state courts according to their

own rules. As this Court explained more than 50 years ago, in perhaps its most famous statement on the subject of retroactivity, "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward"; "[t]he choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 365 (1932). See *Havemeyer v. Iowa County*, 70 U.S. (3 Wall.) 294, 303 (1865); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 206 (1863). Of course, state courts are free to apply the *Chevron* standard (or something that looks like it) in settling upon appropriate remedies—and many do¹¹—but their misapplication of *Chevron* in a lawsuit grounded on state law does not provide federal grounds for complaint.

Absent overriding federal constitutional considerations, the availability of a tax refund—which involves "essentially issues of remedy" (*Bacchus*, 468 U.S. at 276-277)—therefore should be settled by state law. And the simple fact that the injury giving rise to the remedy involved the federal Constitution does not make reference to state law inappropriate. After invalidating underinclusive state programs under the Equal Protection Clause, for example, the Court has left it to the state courts to determine, as a matter of state law, whether the pool of beneficiaries should be expanded or contracted. See *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982).

¹¹ See, e.g., *Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, app. dismissed and cert. denied, 108 S. Ct. 2030 (1988); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), cert. denied, 464 U.S. 993 (1983). Some States, however, have developed their own retroactivity tests. See, e.g., *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), app. dismissed, 107 S. Ct. 1949 (1987).

See also *Williams v. Vermont*, 472 U.S. 14, 28 (1985). The Court has followed an identical course in leaving to the state courts the formulation of a remedy for a violation of the Supremacy Clause. *Exxon Corp.*, 462 U.S. at 196-197. Indeed, in the Commerce Clause area the Court already has at least implicitly acknowledged the relevance of state law in determining entitlement to a refund; the Court has declined to resolve refund claims coming from state courts, explaining that it would "not take upon itself in this complex area of state tax structures to determine how to apply its holding[s]." *Tyler Pipe Industries*, 107 S. Ct. at 2822. See *Bacchus*, 468 U.S. at 276-277. This course, we believe, is a sensible one. Leaving the development of remedies to the state courts may give States a flexibility that will benefit both out-of-state taxpayers and the public: States may, for example, use tax credits or other forms of relief in the place of more disruptive refunds.

Having said this, we recognize that there obviously are federal components to the questions here: one of these cases involves the effect to be given a decision of this Court rather than, as in *Sunburst*, of the highest court of a State; in both cases the controversy that led to the remedy question involved the meaning of the federal Constitution, although petitioners proceeded under state refund statutes. It therefore might be appropriate for this Court to mandate the use of particular (or nationally uniform) remedies if doing so were necessary to effectuate the Commerce Clause.¹² Cf. *Chapman v.*

¹² Unless it is necessary to effectuate the Commerce Clause—and as we explain in text, it is not—there are no federal policies here militating in favor of the creation of a nationally uniform refund remedy. Compare *West Virginia v. United States*, 107 S. Ct. 702, 705-707 (1987); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). To the contrary, the area of taxation is one in which the State's interest in using its own rules is especially compelling. See, e.g., *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). See generally *United States v. Yazell*, 382 U.S. 341 (1966).

California, 386 U.S. 18, 21 (1967). Absent the existence of a special federal interest that would be furthered by particular remedies, however, the choice of remedy should be left to state law. And as we explain below, there is no such federal interest in these cases.

b. Petitioners assert (ATA Br. 28-33; McKesson Br. 37-40) that a federal rule mandating retrospective relief is necessary to deter state legislatures from enacting, and state executives from enforcing, tax schemes that are inconsistent with the Commerce Clause. But this argument proves too much. It leads to the conclusion that retrospective relief should be awarded by this Court whenever governmental entities are found to have acted in violation of the Constitution or federal law, except perhaps in cases where the invalidity of the governmental action could not possibly have been anticipated. As noted above, however, the Court has rejected such an approach. Indeed, in other contexts the Court has found that the specter of retrospective liability is not necessary "to ensure compliance with [its] decisions." *Long*, 108 S. Ct. at 2362. See *Norris*, 463 U.S. at 1106-1107 (opinion of Powell, J.); *id.* at 1110 (O'Connor, J., concurring). Moreover, given the highly disruptive effects of retrospective liability, petitioners' approach threatens to over-deter by "undermin[ing] the initiative of state legislators and executive officials alike." *Lemon II*, 411 U.S. at 207-208 (plurality opinion).

More fundamentally, petitioners themselves distort the Constitution when they suggest (ATA Br. 29-30 & n.20) that the Court should create special constitutional remedies because state courts cannot be trusted to adjudicate evenhandedly claims grounded on constitutional violations. Noting that "Art. VI of the United States Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws, and treaties," this Court repeatedly has refused "to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*,

420 U.S. 592, 611 (1975). See *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1528 (1987); *Moore v. Sims*, 442 U.S. 415, 430 (1979).

In fact, the performance of state courts would not support such an assumption. Those courts have, with regularity, invalidated state statutes that are inconsistent with the Commerce Clause; indeed, the Supreme Court of Florida did just that in *McKesson*. See also, e.g., *Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984). State courts also have awarded refunds to taxpayers in appropriate cases where tax statutes were invalidated under the Commerce Clause or other provisions of federal law.¹³ As decisions cited by the ATA petitioners indicate (Br. 31-32 n.22), state courts have similarly been willing to provide retroactive relief when legislatures attempted to evade the Commerce Clause by enacting successive, unconstitutional levies. And when state courts have declined to make refunds available after finding tax statutes inconsistent with the Commerce Clause or other provisions of federal law, they generally have accompanied their holdings with carefully considered analyses of the factors discussed above: reliance by state authorities on the presumptive constitutionality of legislation, in combination with a well-founded fear that retroactive relief would have devastating fiscal consequences

¹³ See, e.g., *Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984) (previously collected taxes escrowed and then refunded in Commerce Clause case); *Burlington Northern R.R. Co. v. Board of Supervisors*, 418 N.W.2d 72 (Iowa 1988) (refund where state tax preempted by federal law); *LaRoque v. State*, 583 P.2d 1059 (Mont. 1978) (tax invalidated as inconsistent with federal law; refund available if taxpayers complied with state refund procedures); *Westinghouse Electric Corp. v. Tully*, 63 N.Y.2d 191, 470 N.E.2d 853 (1984) (Commerce Clause violation; court remanded for recomputation of tax). See also *Midland Bank & Trust Co. v. Olsen*, 717 S.W.2d 580 (Tenn. 1986) (refund available from time of decision establishing illegality of tax).

for the public.¹⁴ The record thus demonstrates no need for intervention by this Court.

c. Petitioners also assert (ATA Br. 27-28; McKesson Br. 37-38) that refunds would provide the relief necessary to make them whole for the States' violations of the Commerce Clause. As we suggested above, however, this assertion misunderstands the nature of the interests protected by the Clause.

The Commerce Clause does not absolutely entitle taxpayers to a right to trade freely between the States. It does not, after all, "limit the authority of Congress to regulate commerce among the several States as it sees fit," or detract from Congress's authority to "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652 (1981) (emphasis in original) (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980)). See *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). Thus, nothing in the Clause gives individuals a right to engage in commerce; instead, it allocates the authority to regulate commerce "between the national and state governments" (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945)), implementing "the great constitutional purpose of the fathers" to grant Congress rather than the States "the power 'To regulate Commerce with foreign Nations, and among the several States . . .'" *Nippert v. City of Richmond*, 327 U.S. 416, 425 (1946). The Court's decisions in the Commerce Clause area are

¹⁴ See, e.g., *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), cert. denied, 464 U.S. 993 (1983); *Metropolitan Life Insurance Co. v. Commissioner*, 373 N.W.2d 399 (N.D. 1985); *First of McAlester v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); *Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, app. dismissed and cert. denied, 108 S. Ct. 2030 (1988); *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), app. dismissed, 107 S. Ct. 1949 (1987).

accordingly "replete with references to the national or federal interests in preventing the burdensome state regulation of interstate commerce." *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), cert. denied, 469 U.S. 834 (1984) (emphasis in original) (citing *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959); *H.P. Hood & Sons, Inc., v. DuMond*, 336 U.S. 525, 537-542 (1949); *Southern Pacific*, 325 U.S. at 775-776).

Of course, individuals may benefit from the existence of the national free trade area that, in the absence of restrictive congressional action, is created by the dormant Commerce Clause. But that benefit is incidental. Unlike the Bill of Rights and the personal guarantees of the Civil War Amendments, the Commerce Clause was designed to serve national rather than individual ends by forestalling the "drift toward anarchy and commercial warfare" that "came 'to threaten at once the peace and safety of the Union.'" *Hood & Sons*, 336 U.S. at 533 (quoting J. Story, *The Constitution*, Secs. 259-260). See 336 U.S. at 534, 537.¹⁵ Thus, despite occasional references in this Court's opinions "to a right to engage in interstate commerce, * * * the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy." *Consolidated Freightways*, 730 F.2d at 1145.¹⁶ See *id.* at 1144. It is for this reason that,

¹⁵ "It is true that the litigation is between private parties, but the issues touch the relative jurisdiction of nation and state." Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 22-23 (1940).

¹⁶ As Professor Choper has noted, "when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. * * * [W]hen a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has the power to engage in the

as Justice White has noted, the "weight of authority" recognizes that a Commerce Clause violation is not cognizable under 42 U.S.C. § 1983. *Private Truck Council of America, Inc. v. Quinn*, 476 U.S. 1129 (1986) (White, J., dissenting from the denial of certiorari). See, e.g., *Consolidated Freightways*, 730 F.2d at 1144-1146; *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848-849 (9th Cir.), cert. denied, 479 U.S. 1060 (1987) (no Section 1983 cause of action to challenge violation of another power-allocating provision of the Constitution, the Supremacy Clause). See also *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 612-615 (1979) (violation of the Supremacy Clause does not infringe rights "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3)); *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd*, 305 U.S. 576 (1939) (predecessor to 28 U.S.C. § 1343(3) did not provide jurisdiction for a dormant Commerce Clause claim). See generally *White Mountain Apache Tribe*, 810 F.2d at 849-850.

Against this background, petitioners err when they suggest that they somehow are entitled to redress for the burden placed upon them by virtue of the States' violations of the Commerce Clause. The Clause safeguards the national interest in the free flow of commerce; the Arkansas Supreme Court was thus correct in holding (ATA Pet. App. 4a) that the principal purpose of the Clause is vindicated when state barriers to commerce are dissolved. See *Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash. 878, 749 P.2d 1286, *app. dismissed and cert. denied*, 108 S. Ct. 2030 (1988). Because the Clause does not secure any personal right of petitioners, it is largely a matter of indifference to the Constitution whether a refund remedy is available as well.

questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one." J. Choper, *Judicial Review in the National Political Process* 174-175 (1980).

d. In any event, even if the analysis above is incorrect—that is, even if the Commerce Clause creates a right that is in some sense personal to the out-of-state taxpayer—the Clause plainly does not entitle the taxpayer to any particular level of tax. At best, out-of-state taxpayers like petitioners have a right to nondiscrimination in the form of treatment equal to that accorded in-state taxpayers. As the Court has noted time and time again, it is discrimination between residents and non-residents that is the hallmark of a Commerce Clause violation. *See, e.g., Scheiner*, 107 S. Ct. at 2839; *Tyler Pipe Industries*, 107 S. Ct. at 2828-2829; *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); *Lewis*, 447 U.S. at 36-37; *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287-288 (1977); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977); *Nippert*, 327 U.S. at 425; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 35, 49 (1940).

Any personal rights that exist under the Commerce Clause are therefore closely analogous to those created by the Equal Protection Clause (or the equal protection component of the Fifth Amendment's Due Process Clause). As in the Commerce Clause setting, "the right to equal treatment guaranteed by the Constitution [the Equal Protection Clause] is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). This means that the remedy for a program found to be discriminatory under the Equal Protection Clause is "a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by expansion of benefits to the excluded class." *Id.* at 740 (emphasis in original). *See Califano v. Westcott*, 443 U.S. 76, 94-95 (1979) (opinion of Powell, J.). So far as we are aware, however, the Court has never suggested that either the federal or the state and local governments are obligated to remedy

equal protection violations by extending that mandate of equal treatment into the past. Such a doctrine would have incongruous results: it would mean, for example, that a State that improperly accorded special benefits to a small category of persons would either have to reclaim those benefits or make them retroactively available to everyone else in the population.

In our view, the Constitution does not require such an outcome. Indeed, the *Mathews* Court, far from requiring a retroactive equalization of benefits, permitted Congress to make continued use of an improper classification into the future to protect the reliance interests of the previously favored class. *See* 465 U.S. at 745-751. Similarly, as we note above, the Court has left it to state courts to determine, according to state law, how to remedy the defects in state programs that are found to violate the Equal Protection Clause. *See Hooper*, 472 U.S. at 624; *Zobel*, 457 U.S. at 64-65. *See also Exxon Corp.*, 462 U.S. at 196-197.¹⁷ *Cf. Williams*, 472 U.S. at 28. The same reasoning compels the conclusion that a Commerce Clause violation is fully remedied when the State terminates the improper discrimination. Questions about the availability of any additional remedy should be left to the state courts to resolve under state law.

¹⁷ In these Equal Protection and Supremacy Clause cases the Court reasoned that the remedy question involved severance, leaving it to the state courts to determine whether benefit programs would have been enacted in the absence of the unconstitutional limitation. The holdings of the Florida courts below demonstrate the relevance of the equal protection analysis to the Commerce Clause: the Florida courts in effect severed the unconstitutional exemption, leaving the larger tax program in effect. *See McKesson* Pet. App. 27a.

CONCLUSION

The judgments of the Supreme Courts of Arkansas and Florida should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

McKesson Corporation,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

DEPARTMENT OF BUSINESS REGULATION, and

OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER
ON REARGUMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 88-192

McKESSON CORPORATION
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER
ON REARGUMENT

INTRODUCTION

On July 3, 1989, the Court restored this case to the calendar for reargument. The Court directed petitioner McKesson

Corporation ("McKesson") and respondents Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida (collectively, "the State") to brief the following questions:

1. When a taxpayer pays under protest a State tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?
2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

McKesson respectfully submits this Brief on Reargument to address the Court's questions.¹

¹McKesson's updated Rule 28.1 list is attached to this Brief as Appendix A.

SUMMARY OF ARGUMENT

The Court's first question on reargument asks whether a state whose tax statute violates clearly established law under the Commerce Clause must provide retroactive relief.

The Court in this case need only apply equitable principles, which the Court has affirmed in other cases challenging state taxation, to hold that Florida must provide retroactive relief from its unconstitutional taxation.² States may not preserve their unlawful taxation by denying retroactive relief. *See, e.g., Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931).

In this case, the Florida Supreme Court's failure to follow this Court's equitable remedial principles underscores the rationale for ordering retroactive relief. The Florida court's decision, which permitted Florida to retain unconstitutional taxes in violation of the Commerce Clause, encouraged the Florida legislature to enact yet another discriminatory tax scheme, the third unconstitutional Florida tax scheme within this decade.

The Florida court was not free to apply this Court's doctrine to hold that Florida violated the Commerce Clause but then ignore this Court's equitable principles concerning a remedy for Florida's violation. The Court has required states to provide retroactive relief from unconstitutional taxation. The Florida court thus may not construct its own prospectivity doctrine to

²The Court in this case does not need to decide whether a state that *has not waived* its sovereign immunity must provide such relief, since Florida *has waived* its sovereign immunity to allow tax refund actions. The Court also does not need to decide whether the Commerce Clause supports an action for damages, since McKesson has not sought damages for Florida's violation of the Commerce Clause.

limit its Commerce Clause holding and to avoid retroactive relief. The Court articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the prospectivity standard that governs a court's consideration of prospectivity in a case, like this one, concerning the prospective or retroactive operation of federal law.

This Court's *Chevron* standard establishes a threshold test for prospectivity: a court's decision "must establish a new principle of law." 404 U.S. at 106. Where a court's decision has not established any new principle but rather has applied settled principles, a litigant may not legitimately claim justifiable reliance on a former state of the law. Therefore, under the *Chevron* standard, as well as the historic rule that judicial decisions operate retroactively, a court that holds that a tax scheme violates clearly established law under the Commerce Clause must provide retroactive relief.

As the Florida Supreme Court found in this case, Florida's discriminatory Revised Florida Products Exemption, sections 564.06 and 565.12, Florida Statutes (1985), violated clearly established Commerce Clause doctrine. Florida may not claim justifiable reliance on prior law because the Florida Supreme Court's decision did not establish any new principle of law. Thus, the Florida court should not have denied retroactive relief from Florida's unconstitutional discrimination.

The Court's second question on reargument concerns the constitutionality of a retroactive tax as an alternative form of retroactive relief from discriminatory taxation. This Court and numerous other courts have held that a tax that has a limited retroactive reach does not necessarily offend due process because of its retroactivity. See *Welch v. Henry*, 305 U.S. 134,

146-151 (1938). A state that acts promptly to correct discriminatory taxation by retroactively taxing the favored firms – so long as the tax retroactively covers only a brief period – may avoid tax refund liability. Therefore, in some cases, states may utilize retroactive taxation as an alternative to tax refunds where the states' tax schemes are found unconstitutional. However, in this case, retroactive taxation is not an alternative.

First, Florida did not act promptly to remedy its Commerce Clause violation. Florida adamantly avoided correcting its discriminatory taxation, either retroactively or even prospectively. The Florida legislature has not chosen to enact retroactive taxation. Of course, neither this Court nor any Florida court, on its own initiative, may impose a retroactive tax in Florida.

Second, Florida may not now, after resisting equal tax treatment for years, reach back the necessary *five years* to tax retroactively Florida's favored taxpayers. Such expansive, unanticipated retroactivity would resemble confiscation rather than taxation. The Due Process Clause permits only limited retroactivity.

In this case, McKesson submits that a refund of the discriminatory portion of the taxes that McKesson paid remains the only proper, available remedy for Florida's unconstitutional taxation.

ARGUMENT

I. SINCE FLORIDA VIOLATED CLEARLY ESTABLISHED LAW UNDER THE COMMERCE CLAUSE, FLORIDA MUST PROVIDE RETROACTIVE RELIEF

The Court's first question on reargument asks whether a state whose tax statute violates clearly established law under the Commerce Clause must provide retroactive relief.

This Court's decisions establish that a state that collects taxes in violation of federal law must provide retroactive relief from the unlawful taxation. In *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 244, 247 (1931), for example, the Court held that the state had to refund the taxes that it had collected in violation of the Fourteenth Amendment. The Court thereby rejected the state supreme court's remedy, which would have allowed the state to retain the discriminatory taxes, because the state court's remedy failed to vindicate federal rights. *Id.* See also Fallon, *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1210 n.314 (1988). Similarly, in *Ward v. Love County*, 253 U.S. 17, 24 (1920), the Court held that federal law, rather than state law, required the county to refund taxes that the county collected by compulsion in violation of federal law. See also Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 525 (1954).

The Court in this case, however, does not have to consider whether a state that *has not waived* its sovereign immunity must provide retroactive relief from unlawful taxation. Florida *has waived* sovereign immunity and has allowed suits "to determine the validity of a tax and to direct the making of a refund." *State*

ex. rel. Victor Chem. Works v. Gay, 74 So.2d 560, 564 (Fla. 1954). Indeed, the Florida Supreme Court has ordered tax refunds in numerous cases in which taxpayers successfully challenged state tax statutes. See, e.g., *Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Osterndorf v. Turner*, 426 So.2d 539, 545-546 (Fla. 1982); *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972). Historically, the Florida courts have favored taxpayers' expeditious recovery of improper taxes. *State ex rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493, 495 (Fla. 1956). Sovereign immunity simply is not an issue in this case.

This Court's decisions also indicate that the Constitution, in some cases, might support an action for damages where a state has violated the Constitution. See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). A unanimous Court in *Bush v. Lucas*, 462 U.S. 367 (1983), stated: "The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation." *Id.* at 378.

The Court in this case, however, does not have to decide whether the Commerce Clause supports a cause of action for damages. McKesson did not prosecute an action for damages for Florida's violation of the Commerce Clause. McKesson's action, therefore, differs from *Carlson*, or *Davis*, or *Bivens*. McKesson, which brought this action under Florida's general tax refund statute, section 215.26, Florida Statutes (1985), seeks to recover that discriminatory portion of McKesson's taxes that Florida collected from McKesson in violation of clearly established federal law.

In this case, the Court can address Florida's unconstitutional tax discrimination through traditional equitable principles that compel Florida to provide retroactive relief.

A. This Court's Decisions Establish That Florida Must Provide Retroactive Relief

This Court's decisions, in a long line of cases, direct states to provide retroactive relief from taxation that violates federal law. The Court, of course, plainly has authority to direct such equitable relief. "The broad power of federal courts to grant equitable relief for constitutional violations has long been established." *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) (distinguishing between federal courts fashioning equitable remedies for constitutional violations and courts inferring a damages remedy).

First, the Court has established that a state that collects taxes in violation of federal law incurs an obligation to return the unlawful taxes.

In *Ward v. Love County*, 253 U.S. 17, 24 (1920), the Court held that a county had collected certain taxes in violation of the federal Constitution. The Court stated: "[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law."

Similarly, in *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), the Court stated that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the

United States by compulsion is itself in contravention of the Fourteenth Amendment." See also *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981) (ordering state whose tax statute violated the Commerce Clause and Supremacy Clause to provide a tax refund).

Second, this Court has established that a taxpayer from whom a state has exacted taxes in violation of federal law should have an effective remedy to recover the taxes.

Justice Holmes, writing for the Court in *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912), stated:

[i]t is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

In *Montana Nat'l Bank of Billings v. Yellowstone County of Mont.*, 276 U.S. 499, 504-05 (1928), the Court observed that the Montana Supreme Court had repudiated its prior construction of discriminatory state tax statutes, but then had denied a refund of the discriminatory taxes. The Court stated that Montana could not deny the taxpayer effective retroactive relief. "[The taxpayer] cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury."

Similarly, in *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S. Ct. 890 (1989), Justice Brennan's opinion, announcing the judgment of the Court, stated that Texas could not deny a taxpayer the opportunity to pursue effective retroactive relief from unlawful state taxation by *prospectively* curing the violation. "A live controversy persists over Texas Monthly's right to recover the \$149,107.74 it paid, plus interest. Texas cannot strip appellant of standing by changing the law after taking its money." *Id.* at 896.³

Third, the Court has established that where a state has imposed discriminatory taxation in violation of federal law, the state, not the taxpayer, has the obligation to secure equal treatment.

In *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), the Court declared "well settled" the proposition "that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." The Court held that the taxpayers against whom the state had discriminated were "entitled to obtain in these suits refund of the excess of taxes exacted from them." *Id.*

³In *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. 1500 (1989), the Court held that a Michigan tax act violated federal law by favoring retired state and local government employees over retired federal employees. Citing *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), the Court ruled that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." 109 S.Ct. at 1508-09. The State in *Davis*, unlike the State in this case, conceded that a tax refund was the appropriate remedy. *Id.*

More recently, in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S.Ct. 633 (1989), the Court held that a taxpayer who had been subjected to discriminatory taxation was entitled to equal treatment. Further, citing *Iowa-Des Moines* and other cases, the Court held that the state may not remit the injured taxpayer to the remedy of seeking to remove the discrimination. The state, itself, must remove the discrimination. *Id.* at 639.

This Court's opinions articulate equitable principles that implicitly recognize that courts must order states to provide retroactive relief from taxation that violates federal law in order to vindicate the federal law. The rationale for this Court's equitable principles applies whether the Court is resolving a challenge to state taxation under federal statutory law,⁴ the Equal Protection Clause,⁵ the Due Process Clause,⁶ the First Amendment,⁷ or the Supremacy Clause and Commerce Clause.⁸

Indeed, the Florida courts' consideration of McKesson's constitutional claims underscores the rationale for ordering retroactive relief from state taxation that clearly violates federal law. The Florida Supreme Court denied McKesson any retroactive remedy for Florida's unconstitutional discrimination,

⁴See, e.g., *Montana Nat'l Bank of Billings v. Yellowstone County of Mont.*, 276 U.S. 499 (1928).

⁵See, e.g., *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931).

⁶See, e.g., *Ward v. Love County*, 253 U.S. 17 (1920).

⁷See, e.g., *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S. Ct. 890 (1989) (Brennan, J.).

⁸See, e.g., *Maryland v. Louisiana*, 452 U.S. 456 (1981).

permitting Florida to retain, in full, the unlawful taxes. Without fear of liability, the Florida legislature then attempted to deny McKesson even meaningful *prospective* relief. The Florida legislature again enacted a discriminatory tax scheme that violated the Commerce Clause. See *Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129 (Fla. 1989) (holding that Florida's Revised, Revised Florida Products Exemption also violated the Commerce Clause).

The Florida legislators in this case responded to the parochial pressures that, in fact, confront lawmakers in every state. They enacted protectionist legislation to protect their constituents' interests. As this Court observed in *Nippert v. Richmond*, 327 U.S. 416, 434 (1946), "[p]rovincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation." Scholars have observed that "[e]ach state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states," and states "may also use taxation not to raise revenue but to protect the state's producers or other sellers from the competition of nonresidents." R. Posner, *Economic Analysis of Law* § 26.3 at 602 (3d ed. 1986).⁹

This Court has held that the Commerce Clause "forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) (reversing a state court judgment that upheld a challenged tax and denied a tax refund). "The problem," the Court has noted, "comes down therefore to

⁹See also L. Tribe, *American Constitutional Law* § 6-5 at 409, § 6-1 (2d ed. 1988); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986); J. Choper, *Judicial Review and the National Political Process* 205-06 (1980); J. Ely, *Democracy and Distrust* 83-84 (1980).

whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause." *Nippert v. Richmond*, 327 U.S. 416, 434 (1946).

In this case, the Florida legislature tried to be "ingenious" in evading Commerce Clause constraints. The Florida legislature plainly was not "at pains" to avoid infringing the Commerce Clause. The Florida court's decision, rejecting this Court's remedial principles, thereby undermined the federal constitutional provision that the Florida court purported to uphold. Indeed, to date, Florida's pattern of discrimination in this case provides a paradigm for other states that wish to follow Florida's discriminatory example. Already, state lawmakers are susceptible to pressures to circumvent the Commerce Clause. The courts' failure to provide any effective remedy for statutes that violate the Commerce Clause creates a positive *incentive* to evade the law. Florida's successive discrimination demonstrates that some states will not enact constitutional tax legislation if they may enact unconstitutional tax legislation with impunity.

The Florida court did not have discretion simply to ignore this Court's equitable remedial principles after it applied this Court's Commerce Clause doctrine to strike down Florida's statutes. The Florida court could not ignore this Court's principles concerning a remedy for Florida's violation of federal law any more than it could ignore this Court's Commerce Clause doctrine. In cases challenging state taxation under federal law, such as *Allegheny Pittsburgh, Texas Monthly, Iowa-Des Moines, Montana Nat'l Bank, Carpenter, Ward, and Atchison*, this Court did not defer to the state courts to construct the appropriate remedy for the states' violation of federal law. Nor

did the Court permit the state courts to ignore the equitable remedial principles that the Court established to vindicate federal interests.

Indeed, this Court and other federal courts historically have intervened to provide equitable remedies in cases where state courts have not provided an adequate remedy for violations of federal law. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L. Q. 499, 517-18 (1928). In *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S.Ct. 633 (1989), for example, the Court held that certain state tax assessments violated the federal Constitution, and the Court rejected the adequacy of the state supreme court's proposed remedy. The Court held "that petitioners may not be remitted to the remedy specified by" the state court. *Id.* at 637.

This Court does not merely *advise* state courts concerning remedies for states' violations of federal law, but rather establishes those federal principles by which state courts are bound. See generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969). See also Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 523 (1954). The Court has refused to "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967).

The Florida Supreme Court in this case was not free to deny any retroactive relief from Florida's taxation in violation of federal law, permitting Florida to retain the taxes and thereby preserving the unconstitutional discrimination.

B. The Florida Supreme Court Could Not Ignore This Court's Decision In *Chevron* To Avoid Retroactive Relief

The Florida Supreme Court ignored this Court's equitable principles concerning recovery of unlawful taxes. As the court's opinion indicates, the Florida court apparently reasoned that the court could avoid ordering any retroactive relief from Florida's violation of the Commerce Clause by constructing its own prospectivity doctrine to limit its Commerce Clause holding. In applying its own prospectivity doctrine to limit its federal constitutional holding, the Florida court ignored the applicable prospectivity doctrine that the Court constructed in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

The Florida Supreme Court, under *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), is free to apply its own prospectivity doctrine in cases challenging state taxation under state law. See *Mackey v. United States*, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in part and dissenting in part). However, when the Florida court, as in this case, applies federal constitutional doctrine that this Court has established, the Florida court may not ignore this Court's applicable prospectivity doctrine. "*Sunburst* does not, of course, suggest that [a court] may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court." *Lemon v. Kurtzman*, 411 U.S. 192, 200 n.2 (1973).

The Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), articulated the federal standard that appropriately governs courts' consideration of prospectivity on federal

issues.¹⁰ *Chevron* acknowledges a narrow exception to the historic rule that judicial decisions operate retroactively. See *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609 (1987). The *Chevron* standard, by its terms and by logic, does not direct courts in every case to engage in an analysis of prospectivity and retroactivity before rendering their decision. Rather, under *Chevron*, only where a court's decision establishes a *new principle of law*, should the court determine whether the new principle of law shall operate retroactively or only prospectively. *Chevron*, 404 U.S. at 106. See also *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 496-99 (1968). Retroactivity is not an open issue in every case.

Thus, *Chevron's* "new principle of law" test serves as the threshold test for prospectivity. See *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982). *Chevron* directs the court in such a case to consider whether the retroactive operation of the new legal rule "will further or retard its operation." 404 U.S. at 106-07. The court also should "weigh[] the inequity imposed by retroactive application" of the new rule. *Id.* at 107. The *Chevron* standard guides a court in determining whether parties

¹⁰The American Trucking Associations ("ATA"), petitioners in the consolidated case (No. 88-325), and several amici have argued that the Court should establish a standard for a tax discrimination case that is even more stringent than *Chevron* in limiting prospective-only relief. For example, ATA, citing *Owen v. City of Independence*, 445 U.S. 622 (1980), has argued that a prospectivity doctrine should rarely if ever permit a government to avoid compensating the victim of the government's unconstitutional conduct. See Brief for the Petitioners, Case No. 88-325, at 12-13. See also Brief of Tax Executives Institute, Inc. at 20-21, Brief of the Committee on State Taxation of the Council of State Chambers of Commerce at 14-16, and Brief of National Private Truck Council, Inc. at 7-17, amici curiae in No. 88-192 and No. 88-325. A state should have no interest in retaining taxes that it has unlawfully collected. See *Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 378-79 (1933).

may have justifiably relied on a former legal rule and whether, therefore, the new legal rule should operate only prospectively. See *id.* at 108; *Lemon v. Kurtzman*, 411 U.S. 192, 203 (1973); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

When a court has found that a state tax scheme violates clearly established Commerce Clause doctrine, the court may not, consistent with *Chevron* (and the usual rule of retroactivity), deny appropriate retroactive relief. A court whose decision merely applies settled principles of law plainly has not established a new principle of law. The court, therefore, has no cause to engage in a consideration of prospectivity and retroactivity. See *United States v. Johnson*, 457 U.S. 537, 549 (1982).

The Florida Supreme Court in this case, unanimously holding that the discriminatory Florida tax scheme violated the Commerce Clause, applied settled Commerce Clause principles, barring discrimination, that this Court articulated in cases like *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), and *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (J.A. 416-429)¹¹ Florida could not claim justifiable reliance on a former state of the law. The Florida Supreme Court, therefore, had no cause to limit the operation of its federal constitutional holding.

¹¹In this Brief as in McKesson's initial Brief, citations to "J.A." refer to the Joint Appendix and citations to "M.A." refer to McKesson's Appendix attached to its initial Brief.

II. IN SOME CASES, A STATE THAT ACTS PROMPTLY TO CORRECT DISCRIMINATORY TAXATION MAY USE THE REMEDY OF RETROACTIVE TAXATION

The Court's second question on reargument concerns the constitutionality of a retroactive tax as an alternative form of retroactive relief from discriminatory taxation.

Historically, courts and scholars have condemned tax legislation that reaches back to tax transactions that occurred in the past. See generally Note, *Setting Effective Dates for Tax Legislation: A Rule of Prospectivity*, 84 Harv. L. Rev. 436 (1970); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936). "Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960).

Whereas prospective lawmaking is generally associated with legislative action, retroactivity is generally associated with judicial action. See *Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part); Mishkin, *The Supreme Court 1964 Term - Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 59-60, 65-66 (1965). Under the traditional common law distinction, courts declare what the law is and has been, and legislatures declare what the law shall be. "[T]here is the strong common-law tradition that although a court's pronouncements may apply to past conduct, a

legislature's function is to declare law for the future." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960).

This Court, however, has generally accepted the legislative judgment that certain limited retroactivity in tax legislation, particularly concerning income taxation, may be not only necessary but also consistent with due process. See Hochman, 73 Harv. L. Rev. at 706-07. In 1928, Justice Brandeis observed that "[f]or more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation." *Untermeyer v. Anderson*, 276 U.S. 440, 447 (1928) (Brandeis, J., dissenting). Justice Brandeis noted that various tax acts had applied, retroactively, to income earned during the full calendar year of enactment or, in some cases, to income earned during the previous year. *Id.* at 447-49.

In *United States v. Hudson*, 299 U.S. 498 (1937), the Court upheld a special income tax that operated retroactively for a period of 35 days. The Court found that the brief period of retroactivity was not unreasonable. *Id.* at 501. The Court observed:

[a]s respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained

it as consistent with the due process of law clause of the Constitution.

Id. at 500.¹²

A year later, in *Welch v. Henry*, 305 U.S. 134 (1938), the Court established a flexible standard to determine whether retroactive taxation violated due process. The Court stated that "a tax is not necessarily unconstitutional because retroactive." *Id.* at 146. "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 147.

The Court in *Welch* also firmly established that, consistent with due process constraints, the period of retroactive taxation must be limited. In *Welch*, the taxpayer challenged a 1935 tax statute that imposed a tax on income received in 1933. The taxpayer objected that the retroactive taxation imposed a burden without any advance notice. *Id.* at 148. The Court stated that "[a]ssuming that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here." *Id.*

The Court in *Welch* noted that the Wisconsin legislature had acted promptly to effect its retroactive revision. The legislature

¹²The Court in *Hudson* noted that it applied the Fifth Amendment Due Process Clause in that case. 299 U.S. at 500. In *Heiner v. Donnan*, 285 U.S. 312, 326 (1932), also a challenge to a tax act, the Court stated that "[t]he restraint imposed upon legislation by the due process clauses of the [Fifth and Fourteenth Amendments] is the same." The due process analysis in a retroactive taxation case is the same under either the Fifth Amendment or the Fourteenth Amendment.

enacted its revision of the tax laws applicable to 1933 income at its first opportunity after the returns of 1933 income were filed. *Id.* at 150-51. The Court stated: "we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, *Cooper v. United States*, 280 U.S. 409, 411, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment." *Id.* at 150. "While the Supreme Court of Wisconsin thought that the present tax might 'approach or reach the limit of permissible retroactivity,' we cannot say that it exceeds it." *Id.* at 151.

The Court recently has reaffirmed its acceptance of limited retroactivity in tax legislation. In *United States v. Darusmont*, 449 U.S. 292 (1981), the Court reviewed a challenge to federal tax provisions enacted in October 1976 but which operated retroactively to cover the entire calendar year 1976. The Court observed that Congress routinely has given tax statutes an effective date prior to the enactment date. *Id.* at 296. "This 'retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation." *Id.* at 296-97. The Court added: "[t]he Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not *per se* violate the Due Process Clause of the Fifth Amendment." *Id.* at 297.

In *United States v. Hemme*, 476 U.S. 558 (1986), the Court left open the question of whether a particular gift tax revision constituted retroactive taxation. The Court found that the new tax provision did not cause the taxpayer to pay higher taxes or to suffer any oppressive treatment. *Id.* at 570-71. The Court, however, citing the flexible standard articulated in *Welch*,

reaffirmed "that some retrospective effect is not necessarily fatal to a revenue law." *Id.* at 568-69.

Federal courts of appeals have noted that retroactive tax legislation is not necessarily unconstitutional, but that due process limits the permissible period of retroactivity. For example, in *Westwick v. Commissioner of Internal Revenue*, 636 F.2d 291, 292 (10th Cir. 1980), the Tenth Circuit observed that "[i]t is well settled that an income tax may apply retroactively for limited time periods without violating due process." See also *Shanahan v. United States*, 447 F.2d 1082, 1083-84 (10th Cir. 1971). In *Wheeler v. Commissioner of Internal Revenue*, 143 F.2d 162, 166 (9th Cir. 1944), *rev'd on other grounds*, 324 U.S. 542 (1945), the Ninth Circuit considered the constitutionality of retroactive tax statutes:

the courts have held that there is a point of time when such retroactivity is beyond the legislative power. The rule that such amendment to legislation must come within the next session of the legislature or within a reasonable length of time as analyzed in [*Welch*] is the sounder law.

Id. at 168.¹³

¹³In *Canisius College v. United States*, 799 F.2d 18, 23-27 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *Wilgard Realty Co., Inc. v. Commissioner of Internal Revenue*, 127 F.2d 514, 517 (2d Cir. 1942), *cert. denied*, 317 U.S. 655 (1942); *Temple Univ. v. United States*, 769 F.2d 126, 134-35 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986), the courts also observed that due process limits the permissible retroactivity period. In each of these cases, the courts upheld legislation that reached back more than the usual brief period because the retroactive legislation had merely ratified past practice. See *Canisius College*, 799 F.2d at 26-27; *Wilgard Realty*, 127 F.2d at 517; *Temple Univ.*, 769 F.2d at 135.

Numerous state courts also have determined that due process may permit retroactive taxation but limits the permissible period of retroactivity. For example, the New York Court of Appeals in *Replan Dev., Inc. v. Department of Hous. Preservation and Dev.*, 70 N.Y.2d 451, 517 N.E.2d 200, 202 (1987), *appeal dismissed*, ____ U.S. ____, 108 S. Ct. 1207 (1988), observed that "[r]etroactivity provisions in tax statutes, if for a short period, are generally valid." The court, which found that the challenged tax provision's one-year retroactivity period was not excessive, also observed —

the length of the retroactive period often has been a crucial factor, and excessive periods have been held to unconstitutionally deprive taxpayers of a reasonable expectation that they "will secure repose from the taxation of transactions which have, in all probability, been long forgotten" [citations omitted].

Id. at 203.¹⁴

¹⁴See also *Lacidem Realty Corp. v. Graves*, 288 N.Y. 354, 43 N.E.2d 440, 441 (1942); *People v. Graves*, 280 N.Y. 405, 21 N.E.2d 371, 372 (1939); *Gunther v. Dubno*, 195 Conn. 284, 487 A.2d 1080, 1091 (1985); *General Tel. Co. of Ill. v. Johnson*, 103 Ill.2d 363, 469 N.E.2d 1067, 1075-76 (1984); *Keniston v. Bd. of Assessors of Boston*, 380 Mass. 888, 407 N.E.2d 1275, 1285 (1980); *Merchants Nat'l Bank of Boston v. Merchants Nat'l Bank of Boston*, 318 Mass. 563, 62 N.E.2d 831, 837 (1945); *Washington Nat'l Arena Ltd. Partnership v. Treasurer, Prince George's County*, 287 Md. 38, 410 A.2d 1060, 1064, 1069 (1980), *cert. denied*, 449 U.S. 834 (1980); *Comptroller of the Treasury v. Glenn L. Martin Co.*, 216 Md. 235, 140 A.2d 288, 293-300 (1958), *cert. denied*, 358 U.S. 820 (1958); *Klebanow v. Glaser*, 80 N.J. 367, 403 A.2d 897, 900-902 (1979); *Philadelphia Life Ins. Co. v. Commonwealth of Pa.*, 454 Pa. 157, 309 A.2d 811, 814 (1973); *Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A.2d 563, 568-569 (1954), *appeal dismissed*, 349 U.S. 935 (1955); *Colonial Pipeline Co. v. Commonwealth of Va.*, 206 Va. 517, 145 S.E.2d 227, 231 (1965), *appeal dismissed*, 384 U.S. 268 (1966).

In light of this Court's decisions concerning retroactive taxation, a state that acts promptly may, under the Due Process Clause, remedy the effects of a discriminatory tax scheme by retroactively causing the favored local commerce to share equally the tax burden with disfavored interstate commerce. Although the Court's decisions do not establish a firm temporal boundary for permissible retroactivity, this Court's consideration of due process challenges indicates that a statute may reach back to tax transactions that occurred during the full calendar year of enactment or during the preceding year. In some cases, particularly when the affected parties had reason to anticipate revision, a tax may reach back two years, unless otherwise harsh and oppressive. See *Welch v. Henry*, 305 U.S. 134 (1938).

This Court has allowed state courts to choose among alternative remedies in *prospectively* curing certain discrimination. See, e.g., *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 1509 (1989). The Court should extend similar deference to states in *retroactively* remedying the effects of discrimination. In this case as in other cases challenging discriminatory taxation, "[t]he right invoked is that to equal treatment." *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931). In this case as in the *Iowa-Des Moines* case,

[t]he petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, *promptly upon discovery of the discrimination*,

had removed it by collecting the additional taxes from the favored competitors.

Id. (emphasis added).

Thus, where a state acts promptly upon discovery of the discrimination, the state may have alternative options for remedying the discrimination. A state that wants to avoid any refund liability for unconstitutional taxation may promptly end the discrimination and retroactively equalize the tax burden. If, in that case, the state's tax scheme ultimately is held constitutional, the state may, if it chooses, retroactively restore the permissible preference. On the other hand, a state may reject any retroactive taxation and continue to enforce the suspect tax scheme. If, in that case, the state's tax scheme is held unconstitutional, the state may have lost the option of retroactive taxation through the passage of time and may have to provide an appropriate refund to the disfavored taxpayer. Thus, a state that is prepared to act promptly may choose a constitutional remedy that is consistent with its policies.

III. IN THIS CASE, FLORIDA MAY NOT USE RETROACTIVE TAXATION TO REMEDY FLORIDA'S PERSISTENT VIOLATION OF THE COMMERCE CLAUSE

A. Florida Has Not Chosen To Tax Retroactively The Favored Local Commerce

Arguably, Florida, at one time, could have remedied its discrimination by retroactively taxing the favored local firms. Florida choose not to do so.

During the course of this litigation, the Florida legislature has never acted to tax retroactively the favored local firms. Florida did not act after McKesson in 1986 filed this action, after the Florida circuit court in 1987 found Florida's discrimination unconstitutional, or after the Florida Supreme Court in 1988 ultimately struck down Florida's discriminatory scheme. Moreover, in 1988, when the Florida legislature once again enacted a discriminatory alcoholic beverage tax scheme, which the Florida Supreme Court once again struck down as "clearly discriminatory,"¹⁵ the legislature eschewed any retroactive taxation. In the new act, the Revised, Revised Florida Products Exemption, the legislature added a "savings clause" that, if the new discrimination were held unconstitutional, would equalize the tax burden – prospectively but not retroactively. (M.A. 17a-22a)

As the Florida legislature apparently has rejected retroactive taxation, this Court, of course, may not require Florida to tax retroactively the favored Florida firms. *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 1509 (1989) (citing *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961) ("Federal courts may not assess or levy taxes")).

Similarly, the Florida courts may not order retroactive taxation as a remedy in this case. Florida allows the collection of taxes only by an explicit legislative statute, not by judicial decree. *Belcher Oil Co. v. Dade County*, 271 So.2d 118, 122 (Fla. 1972); *Maas Bros., Inc. v. Dickinson*, 195 So.2d 193, 197-98 (Fla. 1967); *Overstreet v. Ty-Tan, Inc.*, 48 So.2d 158,

¹⁵*Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129, 1140 (Fla. 1989).

160 (Fla. 1950); *State ex rel. Seaboard Air Line R. v. Gay*, 160 Fla. 445, 35 So.2d 403, 409 (1948); *State ex rel. Dos Amigos, Inc. v. Lehman*, 100 Fla. 1313, 131 So. 533, 539 (1930). "[The power to tax] is reposed solely in the legislature. A tax sought to be imposed without legislative authority is a nullity." *Department of Revenue v. Young Am. Builders*, 358 So.2d 1096, 1100 (Fla. Dist. Ct. App. 1978), *aff'd*, 376 So.2d 849 (Fla. 1979).

Further, this Court has held that a state may not require an aggrieved taxpayer, like McKesson in this case, to seek to increase the favored firms' taxes, or to wait for the state to do so.

[I]t is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931) (citations omitted). *See also Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S.Ct. 633, 637, 639 (1989).

B. Under The Due Process Clause, Florida Cannot Now Choose To Tax Retroactively The Favored Local Commerce

Florida did not act promptly to end its unconstitutional discrimination against interstate commerce and to equalize retroactively the tax burden. Further, tenaciously resisting equal taxation, Florida did not acknowledge any tax refund liability for its unconstitutional discrimination. Rather, Florida has adopted its untenable prospectivity theory in order to allow Florida to deny any retroactive relief from its unconstitutional taxation. If the Florida legislature, reversing its course, were to act now at its next session in 1990 to impose a remedial retroactive tax, the retroactive statute would have to reach back and tax transactions that occurred *five years* ago.¹⁶

The Florida legislature's equalizing, retroactively, the taxes on interstate and local products would violate due process. When so much time has elapsed, such legislative action would be tantamount to confiscation, rather than taxation. Such a tax, which "attempt[s] to reach events so far in the past," would be harsh, oppressive, and unconstitutional. *Welch v. Henry*, 305 U.S. 134, 147-48 (1938). See generally Novick & Petersberger, *Retroactivity in Federal Taxation*, 37 *Taxes* 407, 420 (1959); Note, *Retroactive Excise Taxation*, 37 *Harv. L. Rev.* 691 (1924). A five-year retroactivity period is far more offensive than the two-year retroactivity period in *Welch*, which presumably "approach[ed] or reach[ed] the limit of permissible

¹⁶The Revised Florida Products Exemption, which McKesson challenged in this action, became effective on July 1, 1985. The earliest the Florida legislature could consider legislation to impose a remedial retroactive tax would be during its next regular legislative session, which begins in April 1990. Fla. Const. art. III, § 3(b).

retroactivity."¹⁷ *Welch v. Henry*, 305 U.S. 134, 151 (1938). A five-year retroactivity period obviously would exceed the "short and limited periods" acknowledged in *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981), and the 35-day period the Court found "not unreasonable" in *United States v. Hudson*, 299 U.S. 498, 501 (1937).¹⁷

Moreover, Florida's favored taxpayers have had no reason to anticipate retroactive taxation as a remedy in this case. "One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." *United States v. Hemme*, 476 U.S. 558, 569 (1986). Cf. *United States v. Darusmont*, 449 U.S. 292, 299 (1981). Where parties have no reason to anticipate a retroactive tax burden on transactions that occurred years ago, they undoubtedly determine their conduct accordingly.¹⁸ For example, companies necessarily make sales commitments, pricing decisions, investment

¹⁷See also *General Tel. Co. of Ill. v. Johnson*, 103 Ill.2d 363, 469 N.E.2d 1067, 1075-76 (1984) (holding that the constitutionality of an unexpected change in tax liability after 3-1/2 years "indeed would be questionable"); *Keniston v. Board of Assessors of Boston*, 380 Mass. 888, 407 N.E.2d 1275, 1285 (1980) (holding that a 3-year retroactivity period violated due process); *Comptroller of the Treasury v. Glenn L. Martin Co.*, 216 Md. 235, 140 A.2d 288, 300 (1958) (holding that a 3 to 6 year retroactivity period violated due process), *cert. denied*, 358 U.S. 820 (1958); *Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A.2d 563, 569 (1954) (applying *Welch* and holding that a tax retroactively applied "beyond the year of the general legislative session immediately preceding that of its enactment" would violate due process), *appeal dismissed*, 349 U.S. 935 (1955); *Lacidem Realty Corp. v. Graves*, 288 N.Y. 354, 43 N.E.2d 440, 441 (1942) (holding 4-year retroactivity period violated due process).

¹⁸The favored firms could hardly anticipate that Florida might later retroactively tax their sales that occurred five years ago. Florida law requires alcoholic beverage manufacturers and distributors to retain sales records for only three years. Fla. Stat. § 561.55, (1987).

decisions, and corporate decisions (such as declaring and paying dividends) in light of anticipated tax treatment. See Novick & Petersberger, *Retroactivity in Federal Taxation*, 37 Taxes 407, 420 (1959).

In this case, the Florida legislature's adoption of retroactive taxation would contradict Florida's historic legislative policies.

First, Florida's taxpayers have understood that Florida's remedy for unlawful taxation is a tax refund. See, e.g., *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982); *State ex rel. Victor Chem. Works v. Gay*, 74 So.2d 560 (Fla. 1954). The State has acknowledged this remedy. In recommending that the Governor veto the discriminatory tax scheme challenged in this case, the Florida Department of Business Regulation, a respondent in this litigation, noted that the tax scheme would leave Florida vulnerable to tax refund actions. (J.A. 158-65) Indeed, the State, in this litigation, specifically argued that Florida law provides for tax refunds. (J.A. 286) When McKesson asked the Florida circuit court to implement its preliminary injunction against the discriminatory tax scheme, pending the State's appeal, the court considered (but later rejected) placing certain taxes in escrow. *Id.* Florida Assistant Attorney General Brown, objecting to any escrow, stated that Florida's refund statute would be available for the recovery of taxes. The Assistant Attorney General acknowledged the "statutory mechanism in place, Section 215.26, allowing for refunds" to taxpayers. *Id.*

Second, as Florida's favored firms have understood, Florida for many years has followed a policy of favoring local commerce.

Before this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), Florida's alcoholic beverage tax scheme, the Florida Products Exemption, discriminated against interstate commerce. *National Distrib. Co., Inc. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988). The Florida Products Exemption specifically favored Florida products. (M.A. 3a-6a)

After the *Bacchus* decision, Florida again rejected equal taxation and enacted the Revised Florida Products Exemption that McKesson challenged in this case. In explaining the purpose of the revised statutes, one sponsor of the new legislation stated:

I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country . . . I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

(J.A. 84) In testifying before another legislative committee, the sponsor stated that "[w]ith the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits." (J.A. 108-09) The Revised Florida Products Exemption continued the original tax scheme's protectionist effect. The revised law simply removed the word "Florida" from the provisions granting favored treatment and substituted specific Florida agricultural products. (M.A. 7a-16a)

After the Florida circuit court held that the Revised Florida Products Exemption unconstitutionally discriminated against

interstate commerce, the State refused to end the discrimination. The State's notice of appeal automatically caused a stay of the circuit court's preliminary injunction under Florida's procedural rules. The State refused to join in McKesson's motion to implement the circuit court's preliminary injunction against the discrimination pending the State's appeal by lifting the automatic stay. (J.A. 272-90) The court thereupon denied McKesson's motion and the discrimination continued.

Even after the Florida Supreme Court in 1988 held that Florida's tax scheme discriminated against interstate commerce, Florida still refused to end the discrimination. Instead, the legislature immediately enacted yet another tax scheme that violated the Commerce Clause. *Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129 (Fla. 1989). The sponsor of the Revised, Revised Florida Products Exemption, who also sponsored the Revised Florida Products Exemption, explained to the legislature that "[o]ur whole-hearted effort here is to protect something that's been in Florida for some 27 years." (M.A. 46a)

For years, through successive enactments of discriminatory legislation, Florida's favored taxpayers have watched the Florida legislature protect local industry. The favored local firms, which have benefited from Florida's resistance to equal taxation, could not anticipate that Florida would reverse course 180 degrees and impose a substantial *retroactive* tax burden on their past sales.

Florida's taxpayers have had no reason to expect that Florida would not permit a tax refund as the remedy, but would – five years later – engage in retroactive taxation. At this date, Florida's engaging in retroactive taxation to remedy its unconstitutional discrimination would violate due process.

CONCLUSION

McKesson respectfully prays that this Court reverse the Florida Supreme Court's final decree with respect to its denial of retroactive relief. In this case, where retroactive taxation is not available, a tax refund is the only appropriate remedy.

Specifically, McKesson is entitled to the difference between what McKesson actually paid in taxes for its disfavored products under the unconstitutional Revised Florida Products Exemption and what McKesson would have paid in taxes under the rates that the State actually set for the favored products.

Dated: August 11, 1989

Respectfully submitted,

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Petitioner McKesson Corporation's Revised
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries) and Affiliates

Armor All Products Corporation
Armor All Products of Canada, Inc.
Armor All Products GmbH
APC Chemicals Inc.
City Properties, S.A.
Comercial Farmaceutica Interamericana, S.A.
Comercial Interamericana, S.A. (Dom. Rep.)
Comercial Interamericana, S.A. (El Salvador)
Comercial Interamericana, S.A. (Guatemala)
Corporacion Bonima, S.A.
Corporacion Interamericana, S.A.
Distribuidores Especialdades, S.A.
Distribuidora Farmaceutica Calox Colombiana, S.A.
Health Data Services, Inc.
Intercal, Inc.
International Health Services, Ltd.
Investigaciones Farmoquimicas De Colombia, S.A.
Laboratorios Calox, C.A.
Medilog Corporation
Medilog GmbH
Organizacion Farmaceutica Americana, S.A.
PCS, Inc.
PCS of New York, Inc.
PCS Services, Inc.
Pharmaceutical Card System Canada, Inc.
Pharmaceutical Data Services, Inc.
SDC Distributing Corp.
Sunbelt Beverage Corporation

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-192

McKESSON CORPORATION,
Petitioner,
 v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
 DEPARTMENT OF BUSINESS REGULATION, and
 OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR RESPONDENTS ON REARGUMENT

Respondents submit this brief in response to the July 3, 1989 order of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a challenge to a 1985 Florida statute imposing a tax on the sale of alcoholic beverages. The statute established a general tax rate for each of several categories of beverages, but it also provided preferences for sales of beverages made from certain citrus, grape and sugarcane products. The Florida Supreme Court held that, by virtue of the preferences, the statute was invalid under the Commerce Clause, and it remedied the violation by ordering that the preferences be stricken from the statute. The court then went on to decide that

petitioner—a taxpayer that had paid at the general rates—was not entitled to a tax refund.

Petitioner now argues that a state court *must* provide a tax refund whenever a tax statute is held unconstitutional. We think that this view is simply incorrect. Even if a refund might be required under certain circumstances, *see, e.g., Carpenter v. Shaw*, 280 U.S. 363 (1930), we see no basis for a hard-and-fast rule that refunds are always necessary. Rather, the courts should proceed according to the circumstances of each case, weighing the nature of the violation, the nature and degree of any injury, and the likely impact of particular relief on government operations. If those factors are applied here, it is readily apparent that petitioner is not entitled to a tax refund.

1. The Commerce Clause is concerned primarily with the division of power between States and the federal government with respect to interstate commerce. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). Although individuals may benefit from its restrictions, their interest is more indirect than those interests under provisions expressly designed to protect individual rights.

Businesses like petitioner have no absolute “right” to prevent States from aiding local enterprises. This Court, in fact, has made clear that States “may enact laws pursuant to [their] police powers that have the purpose and effect of encouraging domestic industry.” *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984). While the dormant Commerce Clause limits the methods by which States can pursue this goal, Congress remains free to authorize the use of means that would otherwise be unacceptable. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

We think, therefore, that the Commerce Clause provides an especially weak basis on which to rest a claim

for retroactive relief. In addition, we think that, even by the standards of that clause, the grounds for the claim here are unimpressive. Petitioner cannot argue, for example, that the legislature attempted to tax subjects beyond its authority and that the State would be “unjustly enriched” in the absence of a tax refund. At most, petitioner can object that the statute was “underinclusive,” *i.e.*, that the legislature should have applied the preferences to all sales or to none at all.

This Court has recognized on several occasions that litigants challenging statutes as “underinclusive” are not automatically entitled to more favored treatment. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Stanton v. Stanton*, 421 U.S. 7 (1975). We do not believe that the principles of these cases are limited to the issue of prospective relief. Indeed, pointing out that even successful plaintiffs may be “deprive[d] . . . of any monetary relief,” *Heckler v. Mathews*, 465 U.S. 728, 739 (1984), the Court appears to have recognized that state and federal courts may eliminate preferential benefits for the future without extending them to all in the past.

The analysis in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), is not controlling on the question of proper remedies for constitutional violations. Although petitioner at times seeks to rely on *Chevron*, the doctrine developed in that case deals with a different situation: whether a rule of law applies to the past as well as the future. Here, the issue is not whether the principles announced by the Florida Supreme Court apply to the past but whether, even if they do, petitioner must be given a tax refund. Like others complaining of “underinclusive” statutes, petitioner is simply not entitled to the relief that it seeks.

2. The remedy for a constitutional violation, in any event, should not exceed the extent of injury suffered. *See generally Milliken v. Bradley*, 433 U.S. 267, 280-81

(1977). A tax refund in this case would compensate petitioner for an injury that does not exist.

The plain fact is that petitioner paid the tax that it should have paid, no more and no less. Although others paid a lower tax on a small number of sales, there is no possibility that the legislature, to achieve equality, would have sacrificed the general tax in favor of the preferences. Almost all sales (approximately 98%) are taxed at the general rates, and an extension of the preferential rates to those sales would result in a grave loss of revenues. Indeed, had petitioner secured its injunction prior to the effective date of the tax, its liability would have been exactly the same.

The Florida court also noted that distributors like petitioner "pass on" the tax to the immediate purchasers. This observation is important for two reasons: first, as the court noted, it indicates that petitioner would obtain a "windfall" by receiving a refund of taxes that it has already shifted to other parties; second, it deprives petitioner of the basis of its cause of action. State law provides for a refund of taxes wrongfully exacted only if the taxpayer in fact bore the economic burden of the tax. See *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973).

Although petitioner frequently refers to the possibility that it suffered competitive injury, that speculation is irrelevant to this lawsuit. Petitioner itself states, in no uncertain terms, that it has brought suit for a tax refund, not damages for any other injury caused by the violation. Moreover, it is by no means clear that it could have sued for competitive injury. State law does not generally provide for claims of damages arising out of a legislative act. See *Trionon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912 (1985). It is likewise uncertain that federal law would supply a cause of action for damages under the Commerce Clause. And, regard-

less of the legal basis of the claim, it seems highly probable that the competitive injury—if, indeed, there is any at all—would be *de minimis*.

3. Both federal and state courts, in fashioning remedies, may properly take into account the possible effects of such remedies on the public interest. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). The need for such attention seems especially compelling when the relief at issue involves retroactive claims on a state treasury. In such cases, the relief is not needed to bring a program into compliance with the Constitution, and it may have an unusually severe impact on state operations.

That is certainly the case here. To begin with, as previously noted, the State did not acquire any additional revenues as a result of the taxing scheme under review: to provide a refund, therefore, is not just a matter of returning money that should not have been taken at all. Furthermore, it should be obvious that the State does not have the funds on hand to pay out hundreds of millions of dollars in back claims. The State would thus be required to cut programs or impose far higher taxes in the future—all in a time of strong pressure on existing state budgets—to provide for the refunds.

Contrary to petitioner's arguments, it is not necessary to require such severe measures in order to deter state legislatures from violating the Commerce Clause. Even if the aim of aiding local businesses was improper in and of itself—which it is not—the penalty here would be wholly disproportionate to the offense. No legislature should be made to pay out truly enormous sums for granting tax relief to a handful of local producers. In addition, the Florida courts have proved highly sensitive to claims of discrimination under the Commerce Clause; those courts can use their injunctive powers to prevent repeated violations if the legislature does not turn to

subsidies or other permissible measures of achieving its goal.

We do not believe, however, that it would be acceptable to remedy the violation here by imposing retroactive taxes on distributors who sold products subject to the preferences. To levy such taxes now, on sales long since past, would mean that distributors could not "pass on" the taxes on those sales to the purchasers. As a result, unlike petitioner who did have that opportunity, the distributors now taxed would bear the full brunt of the tax even though they may have received little or no benefit from the preferences (which primarily benefit manufacturers). Whether or not that treatment would be "so harsh and oppressive" as to be unconstitutional, *see Welch v. Henry*, 305 U.S. 134, 147 (1938), it would plainly be unfair. There is no good reason to go to such lengths to avoid giving petitioner a refund that, in any event, it does not deserve.

ARGUMENT

Petitioner, in responding to the questions posed by this Court in its July 3, 1989 order, argues that a court must always provide a retroactive remedy for a violation of the Commerce Clause. Pet. Supp. Br. at 8-14. We find no such absolute principle either in the Commerce Clause itself or in any other provision of federal law. Rather, we believe, the question of proper remedy must be decided on a case-by-case basis, having due regard for the nature of the violation, the nature and extent of any injury, and the effects of possible remedies on state operations. *See generally Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). A proper application of such factors will allow for retroactive relief to correct genuine injustice, without extending windfalls to undeserving litigants.

Our position, therefore, is not that a taxpayer could never obtain a refund of taxes paid under an unconstitutional statute. This Court on several occasions has indi-

cated that such relief may be available, even necessary. *See, e.g., Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Board of County Comm'rs of Love County*, 253 U.S. 17 (1920). But even if those cases are taken at full value, we submit that retroactive relief is *not* required where, as here, the taxpayer challenges only minor preferences under a general taxing scheme; the taxpayer would have paid exactly the same tax under an even-handed system; the taxpayer passed on the tax to its customers; the taxpayer suffered (if anything) a minimal competitive injury, for which it has not sought redress; and the relief sought by the taxpayer (as well as other possible retroactive relief) would cause serious disruption to state programs. Based on those circumstances, the Florida Supreme Court properly declined to award petitioner the tax refund it sought.¹

1. *The Nature of the Violation.* It is important, at the outset, to review the precise nature of the tax at issue and of the violation found by the Florida Supreme Court. The tax itself is imposed upon the sale of alcoholic beverages within the State. *See Fla. Stat. §§ 564.06, 565.12* (1985); Resp. Br. at 2-4. It is paid in virtually all cases by distributors of the beverages (*Fla. Stat. §§ 561.50, 561.506, 565.13* (1985)), who provide a necessary link in the chain of supply between manufacturers and retailers.² The tax is remitted on a monthly basis, according to the amount of sales during the prior month. *See Fla. Stat. §§ 561.50, 561.506, 565.13* (1985).

¹ In our opening brief, we have argued that the Eleventh Amendment bars this Court from ordering a tax refund in this case. Resp. Br. at 30-39. If this Court concludes that a refund is not required in any event, we believe that the Court need not reach the Eleventh Amendment issue. *See Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982).

² State law prohibits manufacturers from selling directly to retailers. *Fla. Stat. § 561.14* (1985).

There is no question that, had the State imposed the tax equally upon all classes of beverages, the tax would have been upheld. As we have previously noted, Resp. Br. at 9-10, the court below did not find that Florida lacked the power to tax distributors (like petitioner) on the sale of alcoholic beverages generally or that the rate of taxation, in and of itself, was impermissible. The fault in the statute was simply that the State had provided preferences, according to a sliding scale, for sales of beverages made from products commonly found in Florida.³ These preferences, the court found, were forbidden by the Commerce Clause. J.A. 422. To cure the infirmity, the court then struck the preferences from the statute so that all sales within a particular category of beverages were taxed at the same rate.

The nature of this violation seems to us significant in several respects. To begin with, it is well-accepted that the Commerce Clause is a provision designed primarily to allocate power between the States and federal government, not to create personal rights. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-42 (1949). Although individuals may benefit from enforcement of Commerce Clause principles, that indirect interest plainly stands on different footing from interests under other constitutional provisions, which are expressly intended to protect individuals from acts of government. It seems clear, for example, that the Fifth and Fourteenth Amendments would absolutely prohibit the States and the federal government from awarding tax exemptions based upon race or sex, yet it would seem en-

³ The amount of the preferences declined as the amount of beverages sold increased. In every case, at a specified level of sales, the tax on products subject to the preferences would be identical to the tax on products not receiving the preferences. See note 13 *infra*. Examples of the sliding scales are set forth in footnote 2 of the initial Brief for Respondents at pages 3-4.

tirely within Congress' power under the Commerce Clause to grant (or allow States to grant) tax exemptions to local industries. See generally *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422-27 (1946); *McCarron-Ferguson Act*, 15 U.S.C. § 1011 *et seq.* Whatever may be the limitations placed on States by the dormant Commerce Clause, Congress retains the power to "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981) (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980)).

There is nothing, therefore, inherently wrong with efforts to assist local business, provided that the means chosen do not unduly interfere with free, national markets. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry"). Indeed, the Florida Supreme Court, though striking down the preferences in this case, made clear that the State could have pursued the same goal through other programs, including direct subsidies to local manufacturers. J.A. 428-29. For this reason, petitioner can claim no vested right to prevent the State from "encouraging domestic industry" (468 U.S. at 271), even though the effect would be to place products that it distributes at a commercial disadvantage. Its interest, at most, is in assuring that the form of such assistance does not create an improper burden on interstate commerce.

We do not dispute that it is appropriate to accommodate this interest by an injunction barring discriminatory preferences, and the court below has done so. But this type of claim offers weaker grounds for an award of retroactive relief. Given the costs and difficulties of achieving equality after-the-fact, see pages 20-22 *infra*, it makes sense to employ the strongest remedial medicine

where the aim of the legislature, or the basis of the discrimination itself, is most offensive to constitutional principles, not just where the legislature has been mistaken in its choice of means. In those cases the need to protect constitutional values, as well as to deter affronts to those values, is likely to be at its greatest. Though a matter of legitimate concern, a claim of discrimination under the Commerce Clause is nonetheless different from the types of discrimination that courts have traditionally subjected to the most rigorous scrutiny. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Levy v. Louisiana*, 391 U.S. 68 (1967); *Loving v. Virginia*, 388 U.S. 1 (1967).

It is also significant that the violation here does not involve an attempt by the legislature to reach out and tax subjects beyond its authority. A claim for a tax refund—even under the Commerce Clause—might carry greater weight in a case where the legislature had imposed a tax with no legal basis whatsoever. See *Ward v. Board of County Comm'rs of Love County*, *supra*; *Carpenter v. Shaw*, *supra*. In that context, the validity of the tax itself is called into question: if it lacks the power to tax, the taxing authority has presumably taken money to which it has no right in the first place. Absent strong countervailing interests, it may well be reasonable to say that the taxing authority should give it back.⁴

The situation here, however, involves no such overreaching. The State had every right to require distributors of alcoholic beverages to pay a tax on beverage sales within the State. In fact, the State could have subjected peti-

⁴ American Trucking Associations, Inc., in its brief as *amicus curiae*, refers generally to "the state's obligation to return money it had no right to exact in the first place." *Id.* at 23. But it is incorrect to assume that the payment of taxes by those denied an unlawful exemption is "money [the State] had no right to exact in the first place." Whether that characterization can be supported depends on the particular classifications established by the statute and the purpose of the overall taxing scheme. See pages 14-15 *infra*.

tioner and other distributors to *higher* taxes so long as it did not also include impermissible preferences for local products. By incorporating such preferences into the statute here, the legislature, in effect, erred by exercising too little taxing authority, not too much.

This Court has already indicated that, in cases of so-called "underinclusiveness," those challenging an unconstitutional discrimination are not automatically entitled to receive more favored treatment. See Resp. Br. at 10-13; *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Stanton v. Stanton*, 421 U.S. 7 (1975). In *Stanton v. Stanton*, *supra*, a suit brought by a mother seeking additional child support for her daughter, the Court agreed that a State could not cut off support for girls at 18 and for boys at 21. It went on to say, however: "The appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit." 421 U.S. at 18. In *Wengler v. Druggists Mut. Ins. Co.*, *supra*, the Court, having struck down a presumption of dependence for widows but not widowers, did not grant particular relief but left it to the state courts to decide "whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows." 446 U.S. at 152. The Court has "frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." *Heckler v. Matthews*, 465 U.S. 728, 739 (1984).

Petitioner dismisses these cases as involving only prospective relief, but this treatment is too offhand. Realistically, the only way that a successful plaintiff could be "deprive[d] of any monetary relief"—both past and future—would if the State eliminated the benefit for the future and left the past inequality unredressed. The only other alternative would be for the States to eliminate the

benefit for the past as well as the future, a process that would involve thousands of suits to recover payments retroactively from the mothers of boys (in *Stanton*) or from widows (in *Wengler*).⁵ It is difficult to believe that, in saying that plaintiffs might not obtain monetary relief, the Court expected States to resort to such unlikely measures.⁶

Petitioner has also suggested that state courts, when choosing among remedial options, must follow the retroactivity analysis in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Resp. Supp. Br. at 15-17. As we have said before (Resp. Br. at 22-24), however, we do not think that the *Chevron* analysis is controlling on the issue of proper remedies for constitutional violations.⁷ Here, for example, the question is not whether the decision of the Florida Supreme Court should be applied to the past or just to the future, but whether petitioner would be entitled to a tax refund in any event.⁸ The answer to this

⁵ As we discuss later, this sort of relief, even if constitutional, will typically raise insuperable practical problems. See pages 24-26 *infra*.

⁶ Last Term, in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989), the plurality, after noting an argument by the State that any inequality in tax treatment would be cured by removing the tax exemption for religious publications, stated: "If Texas is right, appellant cannot obtain a refund of the tax it paid under protest." *Id.* at 896 (emphasis added). The plurality found that the appellant had standing only because it declined to anticipate what action the Texas courts would take "as a matter of state law to a finding that a state tax exemption is unconstitutional." *Id.* In this case, the state court has already cured the inequality by eliminating the preferences, and it has further held that petitioner is not entitled to a refund.

⁷ At the same time that petitioner seeks to rely on *Chevron*, which recognizes that some decisions apply only prospectively, it also argues that a court must always grant retroactive relief. Whether or not these approaches are consistent, we think that neither is correct.

⁸ The discussion in the text assumes for purpose of argument that the *Chevron* doctrine is applicable to decisions from state

question does not—and should not—turn primarily on whether the principle of law is a new or old one, but on whether the violation caused redressable injury and whether possible remedies are consistent with remedial principles under state and federal law. The *Chevron* test sheds, at best, an indirect light on that inquiry.

In short, we see no reason to award retroactive relief as a matter of course, without regard to the character of the constitutional violation. Regrettable though it may be, the fact is that, in setting up social welfare programs and in fashioning tax systems to fund them, legislatures will sometimes draw improper distinctions. When a classification is particularly virulent, or the injury especially severe in either kind or degree, it may be necessary to fashion retroactive remedies. But it makes little sense to apply the rule without the reason. To require retroactive relief for any and all constitutional violations simply goes too far.

2. *The Nature and Extent of Injury.* The protection of constitutional interests does not require remedies that go beyond actual injury. Where injunctive relief is at issue, therefore, this Court has emphasized that remedies should be remedial—that is, they should be aimed at restoring an injured party to the position that he should have occupied without the violation. *Milliken v. Bradley*, 433 U.S. at 280-81. Retroactive relief should do no more. Here, however, petitioner seeks relief for an injury that it did not suffer.

We stress again a basic fact: petitioner paid the same tax that it would have paid under a system that fully

courts. *But see* Resp. Br. at 22; Initial Br. of National Conference of State Legislatures, *et al.* as *amici curiae* at 10-25. We have also indicated in our initial brief (Resp. Br. at 24-27) our reasons for believing why, even if *Chevron* did apply here, a ruling of "prospective" would be proper.

complied with the Commerce Clause.⁹ Although petitioner seems to base its claim on an implicit assumption that equal treatment would lead to everyone paying taxes at the preferred rates, the assumption is clearly incorrect. The Florida Supreme Court eliminated any constitutional infirmity in the tax statute by simply striking the preferences themselves; yet, after it had done so, petitioner paid the same rate of tax as before.

It is hypothetically true, of course, that, to achieve equality, the State could have adopted a statute providing the preferred rates for all sales of alcoholic beverages; as a practical matter, however, the idea is inconceivable. As we noted in our opening brief (Resp. Br. at 4), the revenues from this tax amount to nearly \$250 million each year, with approximately 98 percent coming from sales of beverages not subject to the preferences. Furthermore, the proceeds from this tax are the third largest source of revenue received by the State. No rational legislature could forego most of this revenue to preserve preferences for what are, in relative terms, a handful of sales. Favoritism or no favoritism, therefore, petitioner would pay the same tax.

We simply do not understand why, having paid no more tax than it should have, petitioner should now be entitled to get most of it back. This is not a case—indeed, it is the exact opposite of a case—in which the legislature has singled out a small number of taxpayers for a burden that it would not apply to taxpayers as a whole. That situation might be different: if the vast bulk of taxpayers pay a preferred rate, and if the constitutional defect is eliminated by extending the pre-

⁹ It is worth noting that, during the period in question, petitioner was free to distribute products qualifying for the preferred rates. Although its decision not to do so does not disable it from objecting to the preferences, the fact that any injury was at least partially self-inflicted provides another ground for rejecting its claim for retroactive relief.

ferred rate to everyone, the taxpayer at least has a credible claim that it paid more than it should have. But there can be no such doubt here: by its injunction, the Florida Supreme Court has required that *all* sales be taxed at the rate paid by petitioner.¹⁰

Petitioner also does not stand in the shoes of those taxpayers seeking refunds who are able to show that a determination of unconstitutionality *before* they paid the tax would have saved them from liability. See, e.g., *Ward v. Board of County Comm'rs of Love County, supra*; *Carpenter v. Shaw, supra*.¹¹ Again, the case for claiming retroactive relief might be more appealing when money is paid and lost solely because of the timing of the lawsuit. But the facts here cut precisely the other way. If petitioner had obtained its injunction the day before the tax took effect, it would not have paid one penny less in tax. Its claim for a refund thus asks for much more than prompt injunctive relief would have achieved.¹²

The Florida Supreme Court further noted that distributors “pass on” the tax burden to their customers. J.A.

¹⁰ The legislature effectively ratified that view in a later statute. See 1988 Fla. Laws Ch. 88-308, Section 12. There, the legislature specified that if the provisions in the new statute were held invalid—as they were (see *Ivey v. Bicardi Imports, Co.*, 541 So.2d 1129 (Fla 1989))—then the earlier statute *as modified by the Florida Supreme Court* should take effect.

¹¹ The Court in *Ward v. Board of County Comm'rs of Love County, supra*, put considerable emphasis on the fact that the county had coerced payment of the taxes by threats of foreclosure and sale. 253 U.S. at 24. In that case, there was no question that, if the taxpayers had been able to obtain injunctive relief in the first place, they would have had no obligation to pay the tax.

¹² This anomalous situation, in fact, would give taxpayers an incentive to delay suit as long as possible to allow the amount of the claimed refund to accrue. The absence of an injunction might cause some modest “competitive injury,” but that injury—at least under taxing schemes like the one here—would be a small fraction of the taxes sought to be recovered. See pages 18-19 *infra*.

430. Petitioner thus finds itself in the position of asking not just for the return of taxes that it would have paid anyway, but for the recovery of taxes that it has already recovered from the next purchaser in the chain. The Florida court observed that "if given a refund, cross-appellants [including petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." *Id.*¹³ To make matters worse, it is presumably those same customers (or their customers) that would absorb any higher taxes now levied to provide the "windfall" that petitioner seeks.

The fact that a tax has been "passed on" is of particular significance under state law. The State has provided for a refund of taxes under certain circumstances, but not if the taxpayer did not bear the financial burden of the tax. *See State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973). The rule reflects the perfectly reasonable notion that businesses collecting sales taxes and similar taxes should not be able to obtain refunds when they have already been made whole at the time of sale. So far as we are aware, there is nothing in federal law that would make such a judgment invalid.

Petitioner has suggested, however, that, if it passed on the tax, it suffered some competitive injury. Pet. Br. at 42; Pet. Reply Br. at 18. The short answer to this assertion is that petitioner did not bring a suit for competitive injury. Indeed, petitioner has expressly disclaimed any intention to sue for damages rather than a "tax refund." Pet. Supp. Br. at 3 n.2 ("McKesson has not sought damages for Florida's violation of the Commerce Clause"); *id.* at 7 ("McKesson did not prosecute an action for dam-

¹³ We also question whether petitioner would have paid lower taxes even if it had been given the benefit of the preferences. Because the preferences are eliminated once sales reach a certain level, and because the products distributed by petitioner are more popular than the products subject to the preferences, the effective rate of tax would likely have been the same. *See* Resp. Br. at 27-28.

ages for Florida's violation of the Commerce Clause"). Even if the speculation about competitive injury had a sound basis, therefore, it would have no bearing on this case.

The decision not to seek damages for any competitive injury is not a surprising one, given that such an action would raise serious questions. To begin with, it is not clear what the source of the cause of action would be. In this case, petitioner has claimed only to be pursuing a cause of action conferred by state law (Pet. Supp. Br. at 7); but, whereas the State has waived its sovereign immunity for *bona fide* claims for tax refunds, it has not done so for claims of damages arising from a legislative act. *See Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 918-19 (Fla. 1985). It is thus doubtful that petitioner could obtain damages for any loss of sales under state law.

The right to recover damages under federal law seems equally uncertain. Petitioner cannot rely on Section 1983 to supply its cause of action against these defendants, because that provision does not authorize suits against States or state officers in their official capacities. *See Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989). Nor is it clear that claims under the Commerce Clause would fall within the scope of Section 1983 even in a suit against proper defendants. *See Private Truck Council of America, Inc. v. Quinn*, 476 U.S. 1129 (1986) (White, J., dissenting from denial of certiorari); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984).

The American Trucking Associations, Inc. say that "there would nevertheless be a federal cause of action implied directly under the Commerce Clause." Brief of American Trucking Associations, Inc., *et al.* as *amici curiae* at 14. But there are several problems with this theory. Most notably, the Commerce Clause—unlike, for exam-

ple, the Fourth Amendment or the Fifth Amendment—is not a provision marking out individual “rights.” See pages 8-9 *supra*. Cf. *Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court has previously been willing to imply a cause of action directly under the Constitution for “the class of those litigants who allege that their own constitutional rights have been violated,” *Davis v. Passman*, 442 U.S. at 242, but it is not at all clear that “third-party beneficiaries” under the Commerce Clause would fall into that class. Furthermore, even if the Court were willing to imply a cause of action for injunctive relief, it does not follow that it must allow claims for damages as well. See *id.* at 244 (existence of cause of action leaves open question “whether a damages remedy is an appropriate form of relief”). Although it may be necessary to permit suits for injunctive relief in order to end ongoing violations, a suit for damages against state officials is concerned entirely with conduct that is past. See *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986). And, we think that the Court should be reluctant to subject state officers to suits for damages, especially in their *official* capacity, if Congress—to whom the power over interstate commerce was specifically granted—has not seen fit to do so.¹⁴

These legal questions aside, a claim based on competitive injury would also face severe factual difficulties. No one questions that, although some sales of alcoholic beverages in Florida were taxed at lower rates, the overwhelming majority of sales (an estimated 97-98%) were taxed at the same rates that petitioner paid. As a result, the only sales that petitioner (and all its competitors) could have lost by virtue of the higher taxes were

¹⁴ The Court would also have to decide whether Florida could invoke its sovereign immunity against damage claims brought in state court. Cf. *American Trucking Ass'n v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *cert. denied*, 483 U.S. 1019 (1987).

the very small number taxed at the preferential rates. The basis of petitioner's suit, therefore, is nothing more than a speculative claim—held in common with all distributors of products not qualifying for the preferences—that some of the relatively few purchasers of local products would have purchased other products in the absence of the preferences.¹⁵ It seems highly probable that any such effects on competition were, at most, *de minimis*.

We agree with petitioner, however, that the Court need not reach any of these difficult issues. What is abundantly clear is that, if petitioner suffered any competitive injury at all, its injury bears no relation whatsoever to the amount of tax payments that it made. The suit actually brought (for a tax refund) is not an equivalent, or even a near cousin, of the suit not brought (for damages arising out of competitive injury). The Florida courts properly addressed the form of relief that petitioner requested and determined, quite correctly, that petitioner was not entitled to it.

Lastly, we note that petitioner should not be permitted to bootstrap its way into a tax refund by employing an all-or-nothing strategy, *i.e.*, by suing for the wrong relief and then arguing that it is being turned away with nothing. Whatever may be the obligation of a State to provide *some* retroactive relief—and we think that there is no such absolute duty—it surely need not provide just any relief that a taxpayer chooses to ask for. To the contrary, a State is entitled to limit its remedial scheme to compensating those injuries actually suffered. Peti-

¹⁵ Because petitioner would have paid the same tax on its sales even if the preferences had not existed—as, for example, it did after they were stricken from the statute—it has no claim that the existence of the tax itself caused potential purchasers not to buy at all. And, it cannot have lost sales to other distributors of non-preferred products because its competitors with regard to those products were (and are) subject to the same tax.

tioner, in its efforts to obtain a "windfall," has failed to meet that basic standard.

3. *The Effects of Proposed Relief.* Retroactive relief in this case, as in many other cases, would plainly cause serious economic and administrative dislocation for the State. There is no good reason to force such dislocation to provide petitioner with an unwarranted refund or, alternatively, to levy an unsought after-the-fact tax on others.

This Court, in assessing claims for particular remedies, has frequently pointed out the need to consider the impact on governmental entities. In *Milliken v. Bradley*, *supra*, for example, the Court specified that, among other things, injunctive orders "must take into account the interests of state and local authorities in managing their own affairs, consistently with the Constitution." 433 U.S. at 280-81. This admonition recognizes that even prospective orders must make a "nice adjustment and reconciliation between the public interest and private needs" *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)). In "constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (footnote omitted).

The standard for awarding retroactive relief against state treasuries should be, if anything, even more sensitive to concerns about "the public interest." In the first place, unlike prospective relief, retroactive relief is not necessary in order to terminate a continuing constitutional violation. This Court has long recognized that courts must have the power to bring States and their officials into compliance with the Constitution, *see, e.g., Ex Parte Young*, 209 U.S. 123 (1908), even to the point of allowing federal courts to burden state treasuries otherwise protected by the Eleventh Amendment. *See Pennhurst*

State School & Hosp. v. Halderman, 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974). But the case for imposing substantial costs on state treasuries is less compelling when future compliance has already been assured; in that case, the costs of "retroactive" compliance may outweigh any possible benefits. *See Papasan v. Allain*, 478 U.S. at 277-78.

An award of retroactive relief may also cause unique difficulties for state financial programs. *See Edelman v. Jordan*, 415 U.S. at 666 n.11 (distinguishing between effects of prospective and retroactive relief). While there is no question that prospective relief in many cases can strain limited resources, States often have options—such as withdrawing from particular programs or lowering the level of payments across the board—that may temper the impact. Those options will typically be unavailable on a retroactive basis. Moreover, because a claim for retroactive relief may accumulate over a period of several years, it may have a more drastic impact on the State treasury when it is finally presented for payment all at once.

For these reasons, it has generally been accepted that prospective and retroactive relief do not always go hand-in-hand. We have already noted, for instance, that the Eleventh Amendment has been construed to bar retroactive relief but not all prospective relief. *See Edelman v. Jordan*, *supra*. A variety of other immunities, likewise, may shield even individual defendants from damages, although injunctive relief is available to stop ongoing conduct. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).¹⁶

¹⁶In some instances, the reverse may be true. For example, courts will typically refuse to enjoin publication of allegedly libelous material, even though a suit for damages will later lie. *See New York v. Mianisota ex rel. Olson*, 283 U.S. 697 (1931).

An award of retroactive relief in this case unquestionably would have a severe impact on the state taxing program. In particular, even though petitioner and its *amici curiae* argue that a State must "return the unlawful taxes" (Pet. Supp. Br. at 8), or must "disgorge unconstitutionally exacted taxes" (ATA Br. as *amicus curiae* at 22), the fact is that, as a straight matter of dollars and cents, the State has nothing to "return" or "disgorge." As we have pointed out, the State did not become any richer by providing preferences for a small number of sales; rather, the State actually chose to forego revenues that it could (and, as it turned out, should) have collected.

The financial problems caused by providing refunds should be self-evident. It hardly needs saying that the State does not have available hundreds of millions of dollars in surplus funds. The revenues taken in during prior years have long since been expended on state programs, and, however much one might wish otherwise, it is not possible magically to return to the *status quo ante*. Any refunds, therefore, would have to be supplied in one of two time-honored ways: either by curtailing programs in the future or by adding new taxes. In times of increasing pressure on state resources, and resistance to the idea of increasing taxes, those proposals could not help but have an adverse effect on state finances.¹⁷

Petitioner and its *amici curiae* argue at length, however, that tough measures are necessary to deter state

¹⁷ The American Trucking Associations, Inc. (ATA Brief as *amicus curiae* at 23) appear to believe that legislatures can easily finance refunds by "new, nondiscriminatory taxes." But, at least where the refunds would amount to the great bulk of taxes paid by all taxpayers in prior years and where the newly-taxed class is very small, the State would have to multiply the tax burden several times over to obtain the needed revenues. That sort of increase is hardly a simple matter for any legislature, particularly where the higher taxes are not accompanied by any improvement in state programs or services.

legislatures from wrongful favoritism. Pet. Supp. Br. at 12-13; ATA Brief as *amicus curiae* at 19-21. According to their view, legislatures will continue to prefer local businesses unless the courts discourage such efforts through retroactive relief. While the concern is a fair one, the proposed solution, at least under the circumstances here, is way out-of-proportion to the concern.

First, we note again that, in seeking to aid local businesses, a state legislature is not doing anything intrinsically wrong. For decades, in fact, the various States have tried to attract, retain, and assist businesses by providing financial incentives, and this Court has acknowledged that these efforts may be wholly legitimate. See *Bacchus Imports, Ltd. v. Dias*, *supra*. Quite apart from any moral considerations, the propriety of the goal means that a legislature does not have to repeatedly defy the Commerce Clause in order to achieve its objectives. A legislature may turn to subsidies or other permissible forms of aid, rather than endlessly pursue the course of resistance envisioned by petitioner.

Second, and in any event, the level of penalty proposed as deterrence is plainly excessive. Even if a legislature explicitly announced its intention to violate the Commerce Clause, the grant of a truly minor exemption would not justify a punishment of several hundred million dollars. As petitioner would have it, a State could be forced to return all of its real property taxes if a single exemption were deemed to violate established constitutional principles, and this result would obtain despite the fact that the general tax would have been the same with or without the exemption. See generally *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. at 908-09 n.3 (Scalia, J., dissenting) (listing exemptions for religious subjects). Here, as we have said, the actual harm caused by the preferences was minimal at best; by contrast, the harm caused by a vast demand on state resources would be serious and real.

Finally, it is simply untrue that, without extreme retroactive punishment, state legislatures will run unchecked. The Florida Supreme Court has proved more than willing to strike down state statutes as incompatible with the Commerce Clause, and, if petitioner truly believes that each new statute is but a copy of the last, it can seek to have its injunction extended to later statutes.¹⁸ Timely injunctive relief would not allow petitioner to build up a claim for tax refund, but it would eliminate any real or imagined competitive disadvantage. And it is always possible that a remedy in damages may lie—at least against individual defendants—if knowing enforcement of a wrongful taxing scheme causes actual injury. See pages 17-18 *supra*.¹⁹

We do not believe, however, that a retroactive tax on exempted sales can reasonably be included on the list of alternative remedies. As an initial matter, it is by no means clear to us that a retroactive tax under the circumstances here would be constitutional. Retroactive legislation, of course, may be constitutional in some cases;

¹⁸ We do not think that each Florida statute is, in fact, the same as the one before, even though the legislature has sought different ways to aid local businesses. After the decision in *Bacchus*, the legislature altered the statutory scheme to eliminate the requirement that products be made in Florida while providing preferences for products made from materials commonly (but not exclusively) grown in Florida. A subsequent statute taxed all sales at the same rate and imposed an additional tax on the act of importing alcoholic beverages into the State. 1988 Fla. Laws Ch. 88-303. A similar tax had been upheld by the Georgia Supreme Court. *See Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E. 2d 190 (Ga.), *appeal dismissed*, 483 U.S. 1013 (1987). Petitioner did not challenge this later statute, although it has been held invalid in a suit by a different plaintiff. *See Ivey v. Bacardi Imports, Co., supra*.

¹⁹ We should point out that businesses engaged in interstate commerce are not always the political wallflowers that petitioner describes. Businesses with a substantial financial presence within a State often will employ lobbyists and make political contributions just as entirely local businesses do.

this Court has held that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (citations omitted). To satisfy due process, the Court has generally required that application of the law at issue, including the decision to make it retroactive, be supported by a rational basis. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

The test in cases of retroactive taxation, though similar, has been set forth in somewhat different terms. In *Welch v. Henry*, 305 U.S. 134 (1938), the Court first acknowledged that "a tax is not necessarily unconstitutional because retroactive." *Id.* at 146. The Court then went on to state: "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 147. The Court has employed a similar analysis in more recent cases. *See United States v. Hemme*, 476 U.S. 558, 568-69 (1986); *United States v. Darusmont*, 449 U.S. 292, 297-99 (1981).

We cannot say with any certainty whether a retroactive tax here would be "so harsh and oppressive" as to violate due process. But it would, in our opinion, be harsh and oppressive. Most significantly, were the State now to tax distributors on their sales of years past, those distributors would lack the power, already exercised by petitioner and others who paid the tax, to pass on the tax on such sales to the immediate purchasers. Unlike petitioner, those distributors would have to bear the full financial burden of the tax, although they themselves may have received little or no benefit from the prefer-

ences.²³ That remedy would create more inequity than it eliminated.

Although the State perhaps could now engage in a form of reverse discrimination—imposing a *higher* tax on sales of local beverages for some period—that plan would be only marginally better. In the first place, it obviously would be a remarkable distortion of the state taxing scheme, effectively requiring the State to discriminate against local businesses. And, in any event, there is no assurance that the businesses subject to this new tax would be the same as those receiving preferences under the former tax scheme several years ago or that, if they were, the disadvantages mandated by the new system would be equal to (or even close to) the advantages conferred by the old one. To impose a significantly greater tax burden on a small, vulnerable industry—whose products account for less than three percent of the market—may do far more harm than simply reverse the effects of the old tax preferences.

There might be sufficient reason to jump through one or another of these remedial hoops if either the violation here or the injury were more grave. But this case involves nothing approaching real injustice. To the contrary, this case involves a creative effort by a taxpayer to turn a small exemption for others into a huge refund for itself. The Florida Supreme Court made a correct assessment of the equities in flatly denying that claim.

²³ As we have said, *see* pages 18-19 and note 15 *supra*, the only possible effect of the preferences is to shift a small number of sales from one product (subject to full tax) to another (subject to a lesser tax). Since few (if any) distributors sell only products taxed at the preferential rates, a shift between products, even if it actually occurs, would not generally lead to greater profits for the distributors.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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Petitioner,

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DEPARTMENT OF BUSINESS REGULATION, and

OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR THE PETITIONER
ON REARGUMENT

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REPLY BRIEF FOR THE PETITIONER ON
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INTRODUCTION

McKesson respectfully submits this Brief in response to the
State's Brief on Reargument.¹

¹McKesson's updated Rule 28.1 list is attached to this Brief as
Appendix A.

The State in its Brief on Reargument has refashioned the arguments that McKesson has made to this Court. The State's Brief suggests that McKesson has argued that every state in every case involving a constitutional challenge to a tax statute must provide retroactive relief. See State's Brief on Reargument at 2, 6, 12 n.7, and 13. McKesson, in fact, has asked the Court to adopt a far more narrow rule that responds to the facts of this case.

Florida imposed the discriminatory tax scheme to protect Florida commerce at the expense of interstate commerce. Florida enacted the challenged tax statutes in violation of clearly established federal constitutional law. Further, Florida has tenaciously resisted equal taxation, and has never sought retroactively to equalize the tax burden. Therefore, Florida, which has waived sovereign immunity to allow suits for tax refunds, must provide an appropriate tax refund to McKesson to remedy its unconstitutional discrimination.

McKesson has not argued that a state whose tax statutes violate the Commerce Clause must provide retroactive relief in every case. This Court does not have to find that all states in all cases challenging tax statutes under the Commerce Clause must provide retroactive relief from unconstitutional discrimination in order to find that Florida must provide such relief in this case. McKesson, as well as 20 states in their amici curiae brief,² submit that a state that enacts a tax in violation of clearly established Commerce Clause law differs from a state that imposes a tax that does not violate clearly established law. As the 20 states note –

if the tax violates clearly established law and if the taxpayer pays under protest, the state could be considered to have been

²Brief of Georgia, Louisiana, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondents ("Amici Curiae Brief of 20 States").

put on notice that its revenues may not be secure from claims for refunds under the questioned statute.

....
In contrast, a state is justified in relying on a tax that taxpayers have paid voluntarily without protest and that does not violate clearly established law.

Amici Curiae Brief of 20 States at 5.

A state whose tax statutes have not violated clearly established federal constitutional law may invoke equitable considerations to avoid retroactive liability for unlawful taxation. However, under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), a state whose tax statutes violate clearly established law may not avoid such relief. Further, under *Welch v. Henry*, 305 U.S. 134, 146-151 (1938), and other cases, a state that cannot remedy its discriminatory taxation by retroactive taxation may have to remedy its discrimination through an appropriate tax refund. Florida, in this case, is such a state.

I. UNDER THE CIRCUMSTANCES OF THIS CASE, FLORIDA MUST PROVIDE AN APPROPRIATE TAX REFUND

This Court's decisions direct states to provide retroactive relief from state taxation that violates federal law. See, e.g., *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931); *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499, 504-05 (1928).

McKesson has acknowledged that this Court's prospectivity doctrine in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), may allow exceptions in certain cases. The Court's prospectivity doctrine permits a court to announce a new principle of law but avoid injustice to a party that had correctly relied to its detriment on the preceding principle of law. Under *Chevron*, when a court in deciding a case has established a new principle of law, the court may weigh certain factors

to determine whether the new principle of law shall operate retroactively or only prospectively. 404 U.S. at 106. Thus, where a state has collected taxes pursuant to a statute that, under a new Commerce Clause principle, is held unconstitutional, a court may properly apply *Chevron* to determine how the new principle should operate.

For example, in the action consolidated with this case, *American Trucking Ass'n v. Smith*, No. 88-325, Arkansas has argued that this Court's decision in *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987), established a new principle of law. Therefore, if Arkansas is correct, the Arkansas Supreme Court in the *Smith* case may have correctly concluded, under the *Chevron* standard, that Arkansas had justifiably relied on former law and that retroactive relief should not be available in that case.

In this case, however, the Florida Supreme Court's opinion acknowledges that the court simply applied settled Commerce Clause principles to hold that Florida's discriminatory tax scheme violated the Constitution. "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively." *United States v. Johnson*, 457 U.S. 537, 549 (1982). Under *Chevron* and the usual rule that judicial decisions operate retroactively, see *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608-09 (1987), McKesson is entitled to retroactive relief from Florida's violation of clearly established law.³

³The states of California, Idaho, Montana, North Dakota, Texas, Utah, Arizona, Hawaii, Minnesota and the District of Columbia, which filed an amici curiae brief on reargument in support of the State in this case, agree with McKesson that *Chevron* should apply to any consideration of prospectivity in this case. See Amici Curiae Brief on Reargument of California, *et al.* at 3.

Further, McKesson has acknowledged that the Court in this case does not have to address whether a state that has not waived its sovereign immunity must provide retroactive relief from taxation that violates federal law. The Florida Supreme Court's opinion does not raise sovereign immunity as an issue in this case. Nonetheless, both the State and certain amici curiae argue that sovereign immunity would bar McKesson from maintaining an action for damages for Florida's violation of the Commerce Clause. Their argument, of course, is beside the point. McKesson has not sued Florida for damages but rather has sought an appropriate tax refund. (J.A. 1-10) The State has conceded that Florida has waived sovereign immunity for tax refunds. State's Brief on Reargument at 17.⁴

Indeed, Florida law has long permitted a taxpayer to challenge the validity of a tax and to seek a refund of invalid taxes. "There have been many suits in Florida to determine the validity of a tax and to direct the making of a refund by the Comptroller under F.S. Section 215.26, F.S.A." *State ex rel. Victor Chem. Works v. Gay*, 74 So.2d

⁴The remedy that McKesson has sought is, in fact, the least intrusive remedy available. McKesson first put the State on notice that it would challenge Florida's tax scheme. McKesson continued to pay all taxes due under the challenged statutes while it pursued this litigation. McKesson did not seek federal court jurisdiction to secure an injunction against Florida's discrimination, but rather filed its action in state court. Arguably, if Florida forecloses tax refunds in Commerce Clause cases, and therefore does not provide a sufficient remedy for its unlawful taxation, the Tax Injunction Act, 28 U.S.C. § 1341, would not bar taxpayers from seeking federal injunctive relief in future cases. See *Hillsborough v. Cromwell*, 326 U.S. 620, 625-26 (1946) (allowing federal jurisdiction because state remedy did not clearly afford full protection of federal rights). Cf. *American Trucking Ass'n v. Gray*, 483 U.S. 1306 (Blackmun, Circuit Justice 1987) (granting application for injunction; stating that Arkansas' denial of recovery of unconstitutional taxes would constitute irreparable injury); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L. Q. 499, 518 (1928) (reasoning that "states could readily prevent interference with their tax collection through suits in the federal courts, by removing the possibility of the claim that there is no adequate remedy at law in the state courts, if the tax is paid").

560, 564 (Fla. 1954). Florida law historically has favored taxpayers' expeditious recovery of improper taxes. See, e.g., *Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Osterndorf v. Turner*, 426 So.2d 539, 545-46 (Fla. 1982); *State ex rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493, 495 (Fla. 1956). In *Green*, for example, the Florida Supreme Court, ordering a tax refund, stated that "[i]n this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover" the taxes. 88 So.2d at 495.⁵

Finally, McKesson has acknowledged that a state may sometimes avoid any refund liability for unconstitutional taxation by promptly ending the discrimination and then retroactively equalizing the tax burden. The State apparently does not contest McKesson's argument that, in some cases, a state might remedy discriminatory taxation by retroactively taxing the favored firms, so long as the tax retroactively covers only a brief period. The State also agrees with McKesson that retroactive taxation would not, however, be an appropriate remedy in this case. See State's Brief on Reargument at 24-26.

⁵Florida, like other states with tax refund statutes, may of course impose certain procedural requirements for a tax refund action, such as a statute of limitations period. The State has never claimed that McKesson did not comply with all such requirements. However, the State has not, to McKesson's knowledge, conceded that other parties that may have filed claims have complied with Florida's procedural requirements. Since McKesson has not sought a refund of hundreds of millions of dollars, McKesson does not know the source for the State's references in its Brief to "hundreds of millions of dollars" in exposure. No Florida court has ever received or considered such figures.

II. THE COMMERCE CLAUSE'S PROTECTION OF THE NATIONAL COMMON MARKET WARRANTS AN EFFECTIVE REMEDY FOR STATES' PROTECTIONIST DISCRIMINATION

This Court consistently has affirmed the Commerce Clause's critical role in protecting "the common market created by the Framers of the Constitution." *Great Atl. & Pac. Tea Co. v. Cottrell, Inc.*, 424 U.S. 366, 380 (1976). The Commerce Clause "further[s] strong federal interests in preventing economic Balkanization." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). The Court has regularly and rigorously scrutinized state efforts to effect economic protectionism. See, e.g., *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Nonetheless, the State contends that states do not have to provide retroactive relief to remedy violations of the Commerce Clause.

First, the State argues that retroactive relief is inappropriate because the Commerce Clause primarily allocates power to the federal government, rather than protects individuals from states' actions. The State's argument ignores this Court's firmly established doctrine that "the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. v. Limbach*, ___ U.S. ___, 108 S.Ct. 1803, 1807 (1988). "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses." *Best & Co. v. Maxwell*, 311 U.S. 454, 457 (1940). The legion of Commerce Clause cases in this Court is ample evidence that injured parties may invoke the Commerce Clause to seek effective relief from states' discrimination against interstate commerce.

The Court in *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. 1500 (1989), rejected an argument that was similar to the argument that the State makes here. In *Davis*, an injured taxpayer claimed that a Michigan tax violated the doctrine of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees. The state argued that the taxpayer could not seek relief from the state's discriminatory taxation. The state contended "that the purpose of the immunity doctrine is to protect governments and not private entities or individuals," and therefore the taxpayer was not entitled to invoke the doctrine for protection. *Id.* at 1507. The Court rejected the state's contention.

It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. [Citations omitted] But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine.

Id. Likewise, *McKesson*, which was subjected to Florida's discriminatory taxation, may invoke the Commerce Clause for protection.

Second, the State argues that this Court's enforcement of the Commerce Clause, unlike the Court's enforcement of other constitutional provisions, does not warrant an effective remedy. The State's assertion ignores this Court's Commerce Clause doctrine. The Court's solicitude for the Commerce Clause has led the Court, for example, to look beyond a challenged statute's ostensible purpose and examine its practical effect. In each case, the Court determines "whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). Both the Court and commentators have acknowledged that "when the centrifugal, isolating or hostile forces of localism are manifested in

state legislation, the interests of the union" require judicial intervention. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 220 (1957).

The State's assertion also ignores the facts of this case. Florida has not allowed the Commerce Clause to deter the State from discriminatory taxation in favor of local commerce. Within this decade, Florida has imposed three successive alcoholic beverage tax schemes that discriminated against interstate commerce. After this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Florida legislature, unconcerned about liability for discrimination, revised Florida's discriminatory alcoholic beverage tax scheme but preserved the discrimination. A legislative sponsor of the revised tax scheme explained: "my entire purpose and intent is simply to retain what we have done for the last twenty years." (J.A. 84) During a later legislative debate, the sponsor reiterated the revised law's purpose. Noting that Florida had "granted a benefit to the distillers in Florida using Florida products for many years," the sponsor explained: "[w]e're simply trying to protect what was in place prior to this Supreme Court [*Bacchus*] decision." (J.A. 141-42)

After the Florida Supreme Court struck down the revised law in this case, the Florida legislature, again unconcerned about liability for discrimination, again revised the tax scheme but preserved the discrimination. The same legislative sponsor, who also sponsored the new revised law, again explained that "[o]ur whole-hearted effort here is to protect something that's been in Florida for some 27 years." (M.A. 46a) Another legislative sponsor of the new revised law stated that even if a court held that the new tax scheme violated the Commerce Clause, Florida could still retain the taxes collected under the statutes. "[T]here will not be a loss of even dollar one to the State of Florida." (M.A. 61a-62a)

The same Florida court that initially held that Florida's first revised scheme was unconstitutionally discriminatory found that the revised, revised scheme was "but a warmed-over version, dressed up

in different clothing" of the earlier scheme. *Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129, 1134 (Fla. 1989). The Florida Supreme Court, affirming that court's judgment, also found the revised, revised scheme "clearly discriminatory." *Id.* at 1140.

The Florida legislature acted to preserve Florida's protectionism despite this Court's holding that state legislation that effects economic protectionism is virtually *per se* invalid under the Commerce Clause. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The Florida legislature ignored this Court's doctrine that a state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880). See also *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980). A state may not "legislate according to its estimate of its own interests [and] the importance of its own products." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting Story, *The Constitution*, §§ 259, 260).

Lawmakers in every state must confront the same parochial pressures to which the Florida legislature responded in effecting its protectionism. See Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986); L. Tribe, *American Constitutional Law* § 6-5 at 409 and § 6-1 (2d ed. 1988). "Each state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states," and states "may also use taxation not to raise revenue but to protect the state's producers or other sellers from the competition of nonresidents." R. Posner, *Economic Analysis of Law* § 26.3 at 602 (3d ed. 1986). Nonetheless, the State in this case invites this Court to hold that even when a state persistently imposes taxes in violation of clearly established law under the Commerce Clause, the state does not have to provide any retroactive relief.

The Florida Supreme Court's decision, denying any retroactive relief from Florida's discrimination in violation of clearly established

law, emboldened Florida to enact yet another discriminatory tax scheme. Numerous other states, as the numerous amici curiae briefs attest, consider this Court's resolution of the Florida case to be significant. This Court's affirming the Florida court's denial of relief would embolden not only Florida but all states to enact protectionist legislation that threatens our national common market. This Court's affirming its decisions directing states to provide retroactive relief from discriminatory taxation would ensure that states "in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause." *Nippert v. Richmond*, 327 U.S. 416, 434 (1946).⁶

III. THE STATE'S "EQUITABLE" ARGUMENTS FOR AVOIDING ANY EFFECTIVE RELIEF IN THIS CASE ARE BOTH IRRELEVANT AND UNFOUNDED

The State in its Brief argues that the Florida Supreme Court's decision to apply its own prospectivity doctrine to limit its federal constitutional holding is not the issue in this case. Rather, the State argues, this Court only must consider the State's "equitable" arguments to find that the Florida court properly denied a tax refund "in any event."

⁶The State's references to cases such as *Heckler v. Mathews*, 465 U.S. 728 (1984), *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980), and *Stanton v. Stanton*, 421 U.S. 7 (1975), are irrelevant. McKesson has never challenged the Florida Supreme Court's prerogative in choosing the form of prospective relief – whether to extend Florida's tax preferences to the excluded class or to withdraw the preferences from the favored class. However, the Florida court's choice of prospective relief did not obviate McKesson's claim for retroactive relief from Florida's unlawful taxation. This Court has not limited an injured taxpayers' relief to a prospective injunction. See McKesson's Brief on Reargument at 8-10. As the Court stated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267-68 n.7 (1984), merely severing the discriminatory exemptions "would not relieve the harm inflicted during the time the wholesalers' imported products were taxed but locally produced products were not."

The State's argument fails to acknowledge that the Florida Supreme Court decided that it could deny a tax refund in this case only by implicitly deciding that it did not have to apply this Court's remedial principles for federal constitutional cases. The reason that McKesson is in this Court is that the Florida Supreme Court was not correct. The Florida court could not apply this Court's constitutional doctrine to strike down Florida's discrimination but then ignore this Court's principles concerning the appropriate remedy. See *Allegheny Pittsburgh Coal Co. v. County Comm'n*, ___ U.S. ___, 109 S.Ct. 633, 637 (1989); *Chapman v. California*, 386 U.S. 18, 21 (1967). See generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969). As the Court stated in *Bush v. Lucas*, 462 U.S. 367, 374 (1983), "[t]his Court has fashioned a wide variety of nonstatutory remedies for violations of the Constitution by federal and state officials." The 50 states may not apply their own 50 different remedial standards when enforcing the federal Constitution.

Certain amici curiae have argued that states should be free to apply their own remedial doctrine even in cases involving federal constitutional rights. See Amici Curiae Brief on Reargument of the National Conference of State Legislatures, *et al.* They argue, for example, that this Court has remanded cases challenging unconstitutional state taxation to the state courts because state law rather than federal law governs the availability of refunds. This Court, however, has remanded such cases to the state courts when the state courts had not already addressed the refund issues "in the first instance." See, e.g., *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 252-53 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984). The Court did not remand the cases because federal law does not apply. Rather, the Court stated that "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, 468 U.S. at 277 (emphasis added). "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." *Id.* at 277 n.14.

The amici curiae also cite *Owens v. Okure*, ___ U.S. ___, 109 S.Ct. 573 (1989), and *Wilson v. Garcia*, 471 U.S. 261 (1985), to support their argument. See Amici Curiae Brief on Reargument of the National Conference of State Legislatures, *et al.* at 21. In *Owens* and *Wilson*, however, this Court held only that courts adjudicating claims under 42 U.S.C. § 1983 should apply certain state statutes of limitations periods. As the Court noted in *Wilson*, federal statutes commonly fail to include specific statutes of limitations. 471 U.S. at 266. Neither *Owens* nor *Wilson* supports the amici curiae's claim that state courts may apply their own remedial doctrine to limit their federal constitutional holdings. Indeed, even these amici curiae acknowledge that "as a general matter, it ultimately is for this Court to determine whether particular forms of relief are necessary to remedy violations of the federal Constitution." Amici Curiae Brief on Reargument of the National Conference of State Legislatures, *et al.* at 19.

Under *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), state courts may apply their own prospectivity doctrine in cases challenging state statutes under state law. See *Mackey v. United States*, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in part and dissenting in part). "*Sunburst* does not, of course, suggest that [a court] may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court." *Lemon v. Kurtzman*, 411 U.S. 192, 200 n.2 (1973).

The *Chevron* doctrine, rather than the Florida court's own prospectivity doctrine, should have guided the Florida court's consideration of prospectivity in this case. Under the *Chevron* doctrine, a court weighs the respective advantages and disadvantages of prospectivity and retroactivity only when its decision has established a new principle of law. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). See also *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609 (1987); *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 496-99 (1968). Otherwise, *Chevron's* exception to the usual rule of retroactivity would become a license for

courts, in every case, to adopt the processes of a legislature and decide how to regulate the effects of their decisions. See *Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part); *James v. United States*, 366 U.S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part); Mishkin, *The Supreme Court 1964 Term - Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 59-60, 65-66 (1965).

Thus, under *Chevron*, the Florida court, whose Commerce Clause decision merely applied settled principles, would not have considered departing from the usual rule of retroactivity because Florida had not justifiably relied on any former principle of law. Under *Chevron*, neither the Florida court nor this Court would consider the "equitable" arguments that the State has advanced to justify Florida's denial of retroactive relief. A state that has violated clearly established law is not in a position to invoke equitable considerations. However, even if the State's "equitable" arguments were relevant, they are without merit.

The State asserts that Florida's discriminatory taxation did not injure McKesson because Florida unquestionably had the power to tax McKesson at the same rate that it did. While Florida plainly had the authority to impose a tax, Florida did not, under the Commerce Clause, have the authority to impose a discriminatory tax in favor of local competitors. The right which McKesson invoked in this case, like the right invoked, for example, in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), and in *Allegheny Pittsburgh Coal Co. v. County Comm'n.*, ___ U.S. ___, 109 S.Ct. 633, 637 (1989), is the right to equal treatment. McKesson does not claim that it is entitled to recover all of the taxes that Florida imposed under its discriminatory scheme. However, McKesson, like petitioners in *Iowa-Des Moines Nat'l Bank*, is entitled to obtain a "refund of the excess of taxes exacted from [it]." 284 U.S. at 247.

The State also asserts that McKesson did not suffer any injury from Florida's discrimination because McKesson simply "passed on" the cost of the tax to McKesson's customers. The State's assertion ignores both the Florida Supreme Court's own findings in this case and elementary economics.

The Florida Supreme Court found that Florida's discriminatory tax scheme had injured McKesson. The court found: "[i]t is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not." (J.A. 426) The court also found that "there are clearly manufacturers and distributors of alcoholic beverages made from local products who receive a competitive advantage from the challenged provision." (J.A. 425) Specifically, the court found that the discriminatory tax scheme "clearly raises the relative cost of doing business" for McKesson and others and "strips away" their "competitive and economic advantages." (J.A. 427)⁷

Indeed, the Florida legislature designed the challenged tax scheme to impose greater costs on interstate commerce to the advantage of local commerce. (J.A. 84, 106-09, 120, 127-30) The legislature intended the discriminatory scheme to cause McKesson and other interstate competitors to raise their prices ("pass on" the added tax) and, therefore, lose market share to the favored local competitors. In testifying before a Florida House of Representatives Committee, one legislative sponsor explained that the Revised Florida Products Exemption was designed to preserve the protectionism that the original Florida Products Exemption had conferred upon the Florida alcoholic beverage industry. "With the language that we have here, we are

⁷The Florida court did not reconcile its speculative "pass-on" claim that it stated at the end of its opinion, when denying retroactive relief, with its finding that McKesson suffered competitive harm as a result of Florida's discrimination. The court does not cite to any evidence, either in or outside the record, to support this "pass-on" claim.

trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits." (J.A. 106-09)

The Florida legislature, in seeking to benefit Florida businesses at the expense of their interstate competitors, understood the economics of its discriminatory tax scheme. The legislature understood that McKesson did not have a monopoly that would allow McKesson to "pass on" higher taxes through higher prices without affecting its volume of sales. McKesson's products directly competed with the favored Florida products. Thus, McKesson could not simply "pass on" the costs of the discriminatory tax in a competitive market and still retain its original market share. Either McKesson could absorb all or most of the taxes and attempt to retain its original market share, or McKesson could increase its price to cover all or most of the taxes and lose some of its original market share. Under either scenario, as the Florida Supreme Court found, and as the Florida legislature intended, Florida's discriminatory tax scheme "stripped away" McKesson's "competitive and economic advantages."

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court rejected the state's claim that the wholesalers had "passed on" the tax and therefore could not show economic injury to support their standing to challenge the tax. The Court observed: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages." *Id.* at 267. The Court also has rejected "pass-on" arguments in antitrust cases, finding that a demonstration of the economics of such arguments would require a showing of "virtually unascertainable figures." *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 491-94 (1968). See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1977). The Court in *Illinois Brick* noted:

[t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions "in the real economic

world rather than an economist's hypothetical model," 392 U.S. at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom. [Footnote omitted]

431 U.S. at 731-32.

The State in its Brief supports its "pass-on" argument by citing *State ex rel. Szabo Food Serv., Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973). *Szabo* addresses a taxpayer's standing to sue, where the taxpayer in fact "bore no tax liability." *Id.* at 532. In this case, the Florida Supreme Court expressly found that McKesson was liable for the challenged taxes and has "standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact" on its business. (J.A. 416) *Szabo* is no answer to the Florida Supreme Court's finding in this case that Florida's discriminatory tax scheme plainly injured McKesson.

In rejecting retroactive taxation for this case, the State observes that retroactive taxation would not be an acceptable remedy for Florida's discrimination because the favored distributors could not "pass on" the burden of increased taxes. State's Brief on Reargument at 6. The State's observation suggests that even the State does not believe that its "pass-on" argument makes sense. If McKesson could have "passed on" the burden of higher taxes without affecting its market share, as the State claims, the favored Florida competitors, of course, could now do the same.

Finally, the State argues that retroactive relief in this case would

impose a burden on the State's treasury.⁸ Florida, however, has resisted every opportunity to eliminate or minimize any burden that this case will impose on its treasury. First, the Florida legislature resolved to preserve rather than excise the protectionism in its alcoholic beverage tax statutes after this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). After the Florida circuit court held in this case that Florida's tax scheme violated the Commerce Clause, the State refused to end the discrimination pending appeal, despite McKesson's argument that continued enforcement of the scheme would further expose Florida's revenues to claims for refunds. (J.A. 272-76) The State also rejected any notion of an escrow for tax funds at risk. (J.A. 286) Florida even resolved to enact yet another discriminatory tax scheme after the Florida Supreme Court's decision in this case. See *Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129 (Fla. 1989). In light of Florida's actions, the State's horrific references to "economic and administrative dislocation," as a result of retroactive relief, fall flat.

This Court's decision to enforce the Commerce Clause by directing Florida to refund discriminatory taxes in this case would not produce economic calamity among states.

First, state legislatures may continue to enact statutes that require interstate commerce to pay its fair share of taxes without discriminating in favor of local commerce. States that do not enact tax statutes in violation of clearly established law may invoke *Chevron's* prospectivity doctrine to avoid retroactive relief in cases challenging their statutes when equitable considerations are compelling. States such as Florida that engage in a pattern of discriminatory taxation in

⁸Curiously, the State repeatedly cites this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977), in arguing that a tax refund would not be appropriate in this case. In *Milliken*, the Court approved extraordinary remedies to overcome the lingering effects of a particular constitutional violation. In this case, the remedy that McKesson has sought, a tax refund, is the *common remedy* under both federal and state law for unlawful taxation.

violation of clearly established law cannot and should not avoid appropriate relief.

Second, a state that acts promptly to correct its discriminatory taxation – rather than tenaciously resisting equal tax treatment – may, if it chooses, avoid or reduce any tax refund liability by retroactive taxation. Florida has rejected retroactive taxation as an alternative remedy for its discrimination. Florida may not now reach back the necessary five years to tax retroactively Florida's favored taxpayers, without violating due process. See, e.g., *Welch v. Henry*, 305 U.S. 134, 146-151 (1938).

Finally, all states, including Florida, retain the uncontested authority to raise additional revenues, if they choose, through additional but equal taxes on commerce.

The State cannot sustain its "equitable" claim that Florida should be allowed to preserve its protectionist discrimination, in violation of clearly established law, by denying any retroactive relief.

CONCLUSION

McKesson respectfully prays that this Court reverse the Florida Supreme Court's final decree with respect to its denial of retroactive relief. Specifically, McKesson is entitled to the difference between what McKesson actually paid in taxes for its disfavored products under the unconstitutional Revised Florida Products Exemption and what McKesson would have paid in taxes under the rates that the State actually set for the favored products.

Dated: October 18, 1989

Respectfully submitted,

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Petitioner McKesson Corporation's Revised
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries) and Affiliates

Armor All Products Corporation
Armor All Products of Canada, Inc.
Armor All Products GmbH
APC Chemicals Inc.
City Properties, S.A.
Comercial Farmaceutica Interamericana, S.A.
Comercial Interamericana, S.A. (Dom. Rep.)
Comercial Interamericana, S.A. (El Salvador)
Comercial Interamericana, S.A. (Guatemala)
Corporacion Bonima, S.A.
Distribuidores Especialdades, S.A.
Distribuidora Farmaceutica Calox Colombiana, S.A.
Health Data Services, Inc.
Intercal, Inc.
International Health Services, Ltd.
Investigaciones Farmoquimicas De Colombia, S.A.
Laboratorios Calox, C.A.
Medilog Corporation
Medilog GmbH
Organizacion Farmaceutica Americana, S.A.
PCS, Inc.
PCS of New York, Inc.
PCS Services, Inc.
Pharmaceutical Card System Canada, Inc.
Pharmaceutical Data Services, Inc.
SDC Distributing Corp.
Sunbelt Beverage Corporation

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No. 88-192

Supreme Court, U.S.

FILED

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In The
Supreme Court of the United States
October Term, 1989

McKESSON CORPORATION,

Petitioner,

vs.

DIVISION OF ALCOHOLIC BEVERAGES AND
TOBACCO, DEPARTMENT OF BUSINESS REGULATION,
AND OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF OF AMICUS CURIAE
U.S. OIL & REFINING CO.
IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

2. May a State, consistent with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

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BRIEF OF AMICUS CURIAE
U.S. OIL & REFINING CO.
IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

U.S. Oil & Refining Co. ("U.S. Oil") is a Delaware corporation in good standing that does business in the states of Washington, Oregon, California and elsewhere. Under statutory threat of penalties, interest and business closure, U.S. Oil has paid the State of Washington certain amounts in accordance with Washington State business

and occupation tax statutes that this Court declared unconstitutional in *Tyler Pipe Industries v. Washington State Department of Revenue*, 483 U.S. 232 (1987). The State of Washington has refused to refund those amounts. See *National Can Corp. v. Department of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286 (1988), *appeal dismissed and cert. denied*, 108 S. Ct. 2030 (1988). U.S. Oil was a party in *Tyler Pipe* and *National Can*, and certain amounts paid by U.S. Oil between January 1, 1980 and June 15, 1985 were involved in those cases. Other amounts paid by U.S. Oil to Washington State between June 16, 1985 and July 23, 1987, were not directly at issue in those cases but were required to be paid under color of the same unconstitutional Washington statutes.

- The resolution of the questions the parties were directed to brief by this Court's Order dated July 3, 1989, will affect the likelihood of U.S. Oil recovering any of the amounts it was unconstitutionally required to pay.

SUMMARY OF ARGUMENT

The Fifth and Fourteenth Amendments to the United States Constitution forbid the taking of private property without just compensation. Although the imposition of a *lawful* tax does not constitute a taking, prior opinions of this Court establish that a taking occurs whenever a state unlawfully acquires private property. States requiring payment of unconstitutional taxes acquire private property unlawfully. Thus, states requiring payment of unconstitutional taxes must pay just compensation. States may not be relieved of their constitutional obligation to pay

just compensation for the taking of private property by choosing to call the taking a tax. Indeed, this Court has had occasion to hold a denial of a recovery of unlawful taxes paid under compulsion unconstitutional. Similarly, states may not evade their constitutional obligation to pay just compensation by prospectively applying the decision that finds the tax illegal or by claiming Eleventh Amendment protections. The constitutionally mandated just compensation remedy for a taking is self-executing and without exception.

ARGUMENT

I. THE TAKING OF PROPERTY WITHOUT JUST COMPENSATION IS UNCONSTITUTIONAL.

The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment,¹ provides in pertinent part that:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

¹ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310 n.4 (1987). This Court has long been of the view that the taking of private property by a state without just compensation is a denial of Fourteenth Amendment due process. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897). Thus, the Eleventh Amendment is no defense to a just compensation claim. See generally *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.") (citation omitted).

The right to just compensation for a taking springs directly from the Constitution and is not dependent on the availability or unavailability of other remedies. *First English Evangelical Lutheran Church v. County of Los Angeles*, *supra*, 482 U.S. at 316 n.9. Moreover, whenever a government unlawfully acquires property a taking occurs.² There are also no exceptions to the just compensation requirement.³ *Id.* at 318-21; *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960). Thus, just compensation is required regardless of the size of the taking⁴ or the extent of the governmental need.⁵

Here, as in *Tyler Pipe*, money was unlawfully required to be paid to a state. Money is property. Thus, the state must pay just compensation for the money taken.⁶

² See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) ("We affirm the traditional rule that a permanent physical occupation of property is a taking.").

³ Not even the absence of actual damages removes the government's obligation to pay just compensation. *United States v. Pewee Coal Co.*, 341 U.S. 114, 118 (1951) ("[I]t is immaterial that governmental operation [of the coal mine] resulted in a smaller loss . . . [than] would have [been] sustained if there had been no seizure of the mines . . . [t]he crucial fact is that the government chose to intervene. . . .").

⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (seizure of 1/8 of a cubic foot of space on the roof of a Manhattan apartment building, though minor, is compensable).

⁵ *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (seizure of coal mines during war held compensable).

⁶ Compensation for the time value of the money is also required. See *Seaboard Air Line Ry. v. United States*, 261 U.S. 299 (1923) (holding that where payment of just compensation is delayed, interest at a reasonable rate must be included).

II. A TAX MAY BE A TAKING.

In both *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478 (1916), and *Village of Norwood v. Baker*, 172 U.S. 269 (1898), this Court held that an assessment for a local improvement that placed an exceptionally disproportionate burden upon certain parcels of property could be sufficiently extreme to constitute a taking. In *Norwood* the Court stated:

[T]he power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizens' right of property.

172 U.S. at 278.

Similarly, in *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1915), this Court observed that it must be conceded that the Fifth Amendment would apply:

where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.

240 U.S. at 24-25; see also *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937) ("[W]e assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.").

III. THIS COURT HAS PREVIOUSLY FOUND STATE DENIALS OF TAX REFUNDS UNCONSTITUTIONAL.

Here, as in *Tyler Pipe*, the discrimination was gross enough for the tax to be unconstitutional. Therefore, by unlawfully expropriating private property, Florida took property in the constitutional sense. If the tax is not refunded, the Fourteenth Amendment will be violated unless just compensation is paid.⁷ "[A] denial by a state court of a recovery of taxes exacted in violation of the laws or constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). In *Carpenter*, the State of Oklahoma argued that no refund was required because taxpayers paid the taxes untimely and taxpayers were only statutorily entitled to a refund of amounts paid timely. The Court in rejecting Oklahoma's argument relied in part on *Ward v. Love County*, 253 U.S. 18 (1920),⁸ where the Court wrote:

⁷ The Constitution does not prohibit the taking of property, only the taking of property without just compensation. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). "If the Government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Id.* at 194 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984)).

⁸ Respondent acknowledges *Ward* and *Carpenter*, see Br. Resp. at 17 n.17, but cannot adequately explain why Oklahoma's illegal acquisition of property in *Ward* and *Carpenter* was tantamount to a taking requiring just compensation in the form of a refund, while Florida's illegal acquisition of property may be remedied purely prospectively.

To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying it could take or appropriate the property of these Indians arbitrarily and without due process of law. Of course, this would be in contravention of the Fourteenth Amendment.

253 U.S. at 24.⁹

IV. JUST COMPENSATION IS THE CONSTITUTIONALLY DICTATED REMEDY FOR A TAKING.

The refund issues here, as in *Tyler Pipe*, "are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce."¹⁰ No matter what the attraction of a purely prospective remedy, the imposition of an unconstitutional tax has already occurred.¹¹ That imposition being a

⁹ *County of Mobile v. Kimball*, 102 U.S. 691 (1880), is distinguishable because it presented the question whether the imposition of a valid tax is a taking. Here, we are presented with invalid taxes. Moreover, the Court's observations in *Brushaber* and its holdings in *Ward* and *Carpenter* were issued some 35-50 years after *County of Mobile*.

¹⁰ *Tyler Pipe Indus. v. Dep't of Rev.*, 483 U.S. 232, 252 (1987) (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 at 276-77 (1984)).

¹¹ We question whether prospective application of a decision invalidating state taxes can be attractive in light of the policy enunciated in *Armstrong v. United States*, *supra*, 364 U.S. at 49 (the just compensation requirement "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

(Continued on following page)

taking, the constitution dictates the retroactive remedy of just compensation.¹²

Application of the constitutional remedy does not affect the state's right to prospectively apply its taxes even-handedly by eliminating the benefit. Neither does the requirement of just compensation affect a state's right to retroactively impose new taxes or, what is the equivalent, retroactively cure a previously imposed defective tax. However, such legislative action would ultimately result in courts (i) speculating whether retroactively collecting previously unimposed taxes is practically possible

(Continued from previous page)

the public as a whole.") and *Owen v. City of Independence*, 445 U.S. 622, 654-55 (1980) ("It has been argued, however, that revenue raised for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer v. Boston* - 'that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] individual, in consequence of the acts thus done. . . . After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.' ") (citation omitted, brackets in original).

¹² "Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, *supra*, 482 U.S. at 316 n.9.

(many taxpayers will have gone out of business, left the state's jurisdiction or otherwise have become judgment proof); (ii) determining whether such collection violates state statutes of limitation or notice provisions; and (iii) deciding whether such retroactive application violates the new taxpayers' due process rights. *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922), and *United States v. Heinszen*, 206 U.S. 370 (1907), illustrate some of the constitutional difficulties in retroactively imposing or curing tax statutes.

CONCLUSION

For the foregoing reasons, this Court should reverse the Florida Supreme Court's final decree with respect to its remedy and remand for a calculation of just compensation.

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1989

McKESSON CORPORATION,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF
THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND
TRANSPORTATION DEPARTMENT, et al.,

Respondents.

On Writ of Certiorari to the Supreme Courts
of the States of Florida and Arkansas

BRIEF AMICUS CURIAE OF THE CROW TRIBE OF
INDIANS IN SUPPORT OF PETITIONERS

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August, 1989

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Nos. 88-192; 88-325

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On Writ of Certiorari to the Supreme Courts
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BRIEF AMICUS CURIAE OF THE CROW TRIBE OF
INDIANS IN SUPPORT OF PETITIONERS

CONSENT TO FILING

Petitioners and Respondents in these consolidated cases have consented to the filing of this *Amicus Curiae* brief. Letters from counsel for all parties granting consent have been separately filed with the Clerk of this Court pursuant to Rule 36.2.

INTEREST OF THE CROW TRIBE OF INDIANS

The Crow Tribe of Indians is a federally recognized Indian Tribe with approximately 8000 members and a reservation of 2.3 million acres located entirely within the State of Montana. Beginning in 1975, the State of Montana adopted and enforced the nation's highest coal severance taxes and collected more than \$53,000,000 from the Tribe's lessee between the years 1975 and 1983.

In 1988, this Court summarily affirmed a decision of the Ninth Circuit Court of Appeals holding Montana's coal severance taxes void on the grounds that they were pre-empted by federal law and policies and that the state taxes interfered with Tribal self-government. *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd* 484 U.S. 997 (1988). Still to be determined in that case is the refund and disposition of taxes paid by the Tribe's lessee between 1976 and 1983, together with interest thereon.¹

¹ Westmoreland Resources, Inc., the Tribe's lessee actually paid Montana's taxes. The Crow Tribe, in 1976, adopted a tribal severance tax applicable to Westmoreland. The Tribe and Westmoreland have agreed that Westmoreland will receive a tribal tax credit for any taxes that it is required to pay Montana.

The Crow Tribe appears as *amicus curiae* to call attention to the possibility that a decision in these consolidated Commerce Clause cases could affect federally protected Indian rights in two ways. First, a ruling that Florida or Arkansas may retain taxes collected in violation of the Federal Constitution could make it difficult or impossible for the Crow Tribe to retrieve the enormous coal severance taxes collected by Montana. Secondly, the Crow Tribe wishes to voice its concern that nothing in the Court's disposition of these cases foreclose the Tribe's presumptive entitlement to interest in conjunction with its tax refund.²

SUMMARY OF ARGUMENT

Indians of necessity have sought the protection of federal law against the actions of states frequently hostile to them and contemptuous of their rights. Protection from invalid state taxes can be of transcendent importance to a Tribal government when, as in the case of the Crow Tribe, those invalid taxes appropriate the mineral wealth of the Tribe. To be meaningful, federal protection must require in every case the refund of illegally exacted state taxes.

² Montana, through its investment of severance tax money, has earned tens of millions of dollars in interest on monies paid by Westmoreland to Montana on account of the state's void tax. The Crow Tribal tax has been ruled valid, and it now appears that Westmoreland's tax payments should have been paid to the Crow Tribe rather than Montana.

This Court, for sound reasons, has consistently required states to refund taxes collected in contravention of federal law. Nonretroactivity, if applied in the cases before the Court, would eliminate this historic requirement. To sanction retention by a state government of funds exacted in violation of federal law stands the Supremacy Clause on its head.

To permit a state to retain monies unlawfully collected by the compulsive process of state tax law not only offends fundamental notions of fair play but such a result will also encourage state legislatures to act in defiance of federally protected rights as so plainly occurred in the Florida case before the Court and in the Montana case involving the Crow Tribe. Public policy demands that this Court reaffirm a rule which will deter rather than promote the parochialism of state legislators.

In tax refund cases, due to the passage of time, the award of interest can be of greater consequence than the tax refund itself. For example, Montana's void taxes were assessed against the Crow Tribe's lessee in 1975, and the Tribe's claim reaches back to that time. The Tribe's claim for interest is more than double the claim for taxes.

The time has come to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay. The Court has properly recognized that the traditional view, which treated prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents "delay damages"

and should be awarded as a component of full compensation.

This case may not provide the appropriate occasion to address the issue of prejudgment interest. Nevertheless, the Crow Tribe requests that the Court be mindful of the important role which interest can play in providing full compensation to an aggrieved taxpayer.

ARGUMENT

I. DECISIONS INVALIDATING STATE TAX STATUTES ON FEDERAL GROUNDS SHOULD ALWAYS BE APPLIED RETROACTIVELY.

This Court has repeatedly ruled that the Constitution mandates a refund of state taxes collected under laws which violate federal law or the Constitution itself. *E.g.*, *Ward v. Love County*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930). It is not surprising that both cases involved Indians who sought protection in the federal courts.

Historically Indians have been particularly vulnerable to improper state actions, including the collection of state taxes. Lacking economic or political power, they must rely on federal protection. Over a century ago, this Court made the following observation:

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from

them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

United States v. Kagama, 118 U.S. 375, 383-84 (1886) (Emphases in original).

In *Ward v. Love County*, 253 U.S. 17 (1920), this Court held that the Due Process Clause of the Fourteenth Amendment required Love County, Oklahoma to refund taxes to an Indian allottee. Said the Court:

... if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. [citations omitted]. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment. . . .

Id. at 24.

Ten years later in *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Court made it clear that a state will not be allowed to vitiate federally protected rights. Thus a state could not, on state law grounds, seek to avoid the mandate of federal law.

Where a Federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislature, or relieved by it from considering the real nature of the tax and its effect upon the federal right asserted.

Carpenter v. Shaw, *supra*, at 367-68. The Court reaffirmed the holding of *Ward v. Love County*, *supra*, "that a denial

by a state court of a recovery of taxes enacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the 14th Amendment." *Id.* at 369. See, also, *Montana Nat'l Bank of Billings v. Yellowstone County, Montana*, 276 U.S. 499, 504, 505 (1928) (unlawfully exacted funds cannot remain in public treasury); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (refund taxpayer's federal remedy); *Maryland v. Louisiana*, 451 U.S. 456, 457 (1981) (refund together with interest).

The above-cited cases reflect this Court's recognition of the result required by fundamental notions of fair play. Any other result would be plainly inconsistent with the Supremacy Clause, because it would subordinate constitutionally mandated rights to state interests.

In cases involving state taxation, moreover, there is no occasion to consider the narrow exception to the rule of retroactivity which applies where an unanticipated new rule could cause injustice to innocent parties by, for example, voiding marriages, making municipal bonds worthless, or retroactively changing limitation periods. See, *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Taxation differs from the cases governed by the *Chevron* rule because it concerns money rather than legal status or rights. While in some instances a state may not anticipate that its tax law will be ruled unconstitutional, it will *never* be constitutionally acceptable to deprive a taxpayer of a refund on this account. The monies paid to the state are "property" within the meaning of the Fourteenth Amendment, and the state's permanent deprivation of a refund or other retrospective relief for a tax collected in violation

of federal law constitutes a forbidden taking. *Ward v. Love County, supra*.

Nor is it appropriate to reward states which violate federally protected rights. State legislators are elected to represent the popular, majoritarian interests of their districts. The behavior reflected by Florida's legislators in revising the revised products exemption without any serious regard to constitutional limitations, *see, McKesson Corporation's Brief at 15-16*, is similar to the Montana legislature's actions in deliberately disregarding the federally protected rights of the Crow Tribe with respect to the coal severance tax. If Florida, Montana, or Arkansas is permitted to retain any portion of its illegal tax revenue, then their disregard for federally protected rights will be inappropriately rewarded.

A very different result is required in order to foster concern for federally protected rights – particularly the rights of minorities. For this reason, the states in every instance should be required to refund all tax revenue collected in violation of federal law together with interest. *See, Maryland v. Louisiana*, 452 U.S. 456, 457 (1981).

II. ALL TAX REFUNDS MUST INCLUDE INTEREST.

In tax refund cases, due to the passage of time, the award of interest can be of greater consequence than the tax refund itself. For example, Montana's void taxes were assessed against the Crow Tribe's lessee in 1975, and the Tribe's claim reaches back to that time. The Tribe's claim for interest is more than double the claim for taxes.

The time has come to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay. *See, Waite v. United States*, 282 U.S. 508, 509 (1931) (interest from time of the taking necessary to constitute adequate compensation under the Fifth Amendment); *Miller v. Robertson*, 266 U.S. 243, 258 (1924) (prejudgment interest required for "full compensation").

The Court has properly recognized that the traditional view, which treated prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents "delay damages" and should be awarded as a component of full compensation. *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 n. 10 (1983). An award of interest, moreover, is governed by federal, not state law. *See, West Virginia v. United States*, 479 U.S. 305, 308-09 (1987). Thus a state's failure to allow interest in state tax refund cases cannot preclude an award of interest where the refund is based on a deprivation of federal rights. *Cf., Board of County Commissioners v. United States*, 308 U.S. 343, 350 (1943).

This case may not provide the appropriate occasion to address the issue of prejudgment interest. Nevertheless, the Crow Tribe requests that the Court be mindful of the important role which interest can play in providing full compensation to an aggrieved taxpayer.

CONCLUSION

For the reasons stated above, this Court should reverse the judgments below with respect to the judgment of prospectivity and rule in favor of Petitioners.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF FLORIDA

BRIEF OF CATERPILLAR INC.
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In this case, the Court has ordered the parties to brief the following issues:

1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

This brief *amicus curiae* addresses only the first question.

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ON WRIT OF CERTIORARI TO
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THE STATE OF FLORIDA

BRIEF OF CATERPILLAR INC.
AS AMICUS CURIAE

INTEREST OF CATERPILLAR INC.

Caterpillar Inc. ("Caterpillar"), with the consent of the parties, submits this brief as *amicus curiae* in support of the position that a state must provide retrospective relief to a taxpayer who pays under protest a state tax which discriminates against interstate commerce. Caterpillar, a Delaware corporation, headquartered in Illinois, is the plaintiff in *Caterpillar Inc. v. State of Michigan, Department of Treasury*, Nos. 84-9664-CM and 87-11109-CM (Michigan Court of Claims). In that case, the Michigan Court of Claims determined that certain provisions of the Michigan Single Business Tax are unconstitutional because they discriminate against interstate

commerce. The court concluded that Caterpillar would be granted prospective relief only. An appeal has been filed with the Michigan Court of Appeals. A decision in this case is likely to affect Caterpillar's Michigan litigation.

SUMMARY OF ARGUMENT

This Court has consistently held that the Commerce Clause prohibits state taxes which discriminate against interstate commerce. This prohibition protects two separate but related interests: the power of Congress to regulate commerce and the right of interstate businesses to equal tax treatment with local businesses.

When a state tax discriminates against interstate commerce, the proper remedy is to retroactively restore the equality required by the Commerce Clause. This is the remedy which the Court has approved in cases involving state taxes which violate the Equal Protection Clause.

Permitting a state to provide only prospective relief does not protect the rights of interstate businesses to equality of taxation. The only counterweight to the provincial interests and local political power which are often the source of discriminatory taxation are the courts of the fifty states and the United States Supreme Court.

I.

THE COMMERCE CLAUSE PROHIBITION OF DISCRIMINATORY TAXATION

At least since *Welton v. Missouri*, 91 U.S. 275 (1876), this Court has consistently held that the Commerce Clause prohibits state taxes which discriminate against interstate commerce. As this Court stated in *Guy v. Baltimore*, 100 U.S. 434 (1879):

[I]t must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

100 U.S. at 439. This doctrine was cited with approval most recently in *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 108 S.Ct. 1803 (1988). Justice Scalia stated:

It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. This "negative" aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

108 S.Ct. at 1807 (citations omitted). It is, of course, this line of authority which the Florida Supreme Court used to strike down the tax at issue here.

This line of authority was also followed in striking down the provisions of the Michigan Single Business Tax at issue in *Caterpillar Inc. v. State of Michigan, Department of Treasury*. The decision acknowledges that the discriminatory effect of the Michigan law had been consistently ruled unconstitutional by this Court. Nonetheless, the court granted only prospective relief. The court justified this choice by claiming that the United States Supreme Court decisions had never invalidated an unconstitutional tax deduction, only unconstitutional tax credits. The court did not explain the significance of this distinction. There is none. Tax deductions and tax

credits operate in the same manner, to reduce the tax which would otherwise be due. A copy of the Court of Claims decision is attached as Exhibit A.

II.

THE PROHIBITION AGAINST DISCRIMINATORY TAXATION VINDICATES BOTH THE NATIONAL INTEREST AND THAT OF THE AFFECTED TAXPAYERS

The Commerce Clause prohibition against discriminatory taxes is frequently explained as necessary to create "an area of trade free from interference by the states. . . ." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, at 328 (1977). However, it was recognized as early as *Guy v. Baltimore*, that the Commerce Clause prohibition against discriminatory taxation serves two purposes. Justice Harlan explained the prohibition against discriminatory taxation as follows:

If this were not so [prohibition against discriminatory taxation], it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired.

100 U.S. at 439-440 (emphasis added). In sum, the Commerce Clause protects both Congress' right to regulate interstate commerce and interstate business' right to commercial privileges equal to those granted an intrastate business. This point was made again in *Best & Company, Inc. v. Maxwell*, 311 U.S. 454 (1940):

The freedom of commerce which allows the merchants of each state a regional or national market for their goods is

not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.

311 U.S. at 457 (emphasis added). In *Nippert v. Richmond*, 327 U.S. 416 (1946), Justice Rutledge struck down a local tax on solicitors as discriminating against interstate commerce. He again acknowledged the right of interstate commerce to be free of discriminatory taxation and the personal nature of that right:

The drummer is a figure representative of a by-gone day. But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about *his protection* from the kind of local favoritism the facts of this case typify.

327 U.S. at 435 (emphasis added). *Guy v. Baltimore*, *Best & Company, Inc.* and *Nippert* establish what ought to be a self-evident proposition. The national interest in free trade and the right of each individual participant in interstate commerce to equal tax treatment are intertwined and are both protected by the Commerce Clause.

III.

THE PROPER REMEDY FOR DISCRIMINATORY STATE TAXATION IS THE RESTORATION OF EQUALITY

While this Court has not addressed the question of the appropriate remedy for discriminatory taxation under the Commerce Clause, the Court has addressed the question of remedy when a tax is stricken under the Equal Protection Clause. That remedy is a restoration of equal taxation.

In *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), the Court directly addressed the remedy appropriate

to a taxpayer suffering discriminatory taxation. Its teaching is equally applicable here. Justice Brandeis, speaking for the Court, stated:

The petitioners' rights were violated, and the cause of actions arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that of equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the other should have paid. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

The petitioners are entitled to obtain in these suits refund of the excess taxes exacted from them.

284 U.S. at 247 (citations omitted). The same point was made by Justice Douglas in *Hillsborough v. Cromwell*, 326 U.S. 620 (1946):

The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right of equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his

own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of the other members of the class.

326 U.S. at 623. This doctrine was most recently approved in *Allegheny Pittsburgh Coal Company v. County Commissioner of Webster County, West Virginia*, 109 S.Ct. 633 (1989). There, Chief Justice Rehnquist, speaking for a unanimous court, cited both *Hillsborough* and *Iowa-Des Moines National Bank* with approval in connection with directions for remand and relief of discriminatory taxation.

The discrimination practiced in *Iowa-Des Moines National Bank*, *Hillsborough* and *Allegheny Pittsburgh Coal Company* is neither different in kind nor degree than that which has been condemned in Commerce Clause cases.¹ The taxpayer against whom the discrimination is practiced is entitled to relief in the form of equality. This requires retroactive adjustment of the tax burdens to restore equal treatment.

IV.

PROSPECTIVE RELIEF DOES NOT REMEDY THE COMMERCE CLAUSE VIOLATION

In its Order, this Court limited reargument to the proper remedy where a tax violates established Commerce Clause principles. In such circumstances, prospective relief from discrimination does not adequately address and remedy the violation.

¹ See, e.g., the concurring opinion of Justice Brennan in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), at 532-533. Cases alleging discriminatory taxes often invoke both the Commerce Clause and Equal Protection Clause as grounds for relief. See, e.g., *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984).

It has been suggested in certain recent state court decisions that prospective elimination of the offending provisions of a state tax statute is sufficient to vindicate the purpose of the Commerce Clause. For example, in *National Can Corporation v. Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, cert. denied and appeal dismissed, 108 S.Ct. 2030 (1988), the Washington Supreme Court determined that any change in Washington law could be prospective and thereby denied relief to the affected taxpayers. In discussing whether a prospective remedy would further the purpose of the Commerce Clause (the second part of the *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) analysis), the court stated:

The central purpose of the commerce clause is to create an area of free trade among states

It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in *Tyler*.

109 Wash.2d at 888-889, 749 P.2d at 1291 (citations omitted). The Arkansas Supreme Court cited this language with approval in *American Trucking Association v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), when it granted only prospective application of the decision in *American Trucking Association v. Scheiner*, 483 U.S. 266 (1987). Both of these cases overlook the taxpayer who has suffered harm as a result of discriminatory taxes and who has individual rights which are not protected by prospective application.

The attempt by a state to retain an unconstitutional tax on the basis that the offending provision has been eliminated is

not a recent development. In *Montana National Bank of Billings v. Yellowstone County of Montana*, 276 U.S. 499 (1928), the state attempted just that. In response, this Court stated:

It is true that the state supreme court in the present case expressly repudiated the construction theretofore put by it upon the state statutes in the *Rogers* case, *supra*, and, as already stated, adopted one to the exact contrary. But that does not cure the mischief which had been done under the earlier construction. That construction had already been acted upon by the taxing officials and the application thus made of the statutes had given rise to the present cause of action and an undoubted right to recover thereon. The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration. *Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.*

But it is said that the taxing officers of the county, in view of the later decision, now have the power to tax the shares of state banks and thus bring about an equality. As to this it is unnecessary to say more than that it nowhere appears that these officers, if they possess the power, have undertaken to exercise it or that they have any intention of ever doing so. It will be soon enough to invite consideration of this purely speculative suggestion when, if ever, the taxing officials shall have put it into practical effect.

276 U.S. at 504-505 (emphasis added and citations omitted). More recently, in *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890 (1989), the State of Texas challenged the standing of the taxpayer to claim a remedy for taxes found to violate the First

Amendment by pointing out that the law had been changed to eliminate the unconstitutional provision. Justice Brennan responded:

Texas cannot strip appellant of standing by changing the law after taking its money.

109 S.Ct. at 896. While Justice Brennan's statement related to appellant's standing, it accurately describes the effect of permitting states to grant only prospective relief in cases involving payments under protest.

The payment of the tax under protest is generally required before the taxpayer can challenge an unconstitutional tax.² The availability of only prospective relief would effectively make the tax payment a non-recoverable cost of access to the courts. To require the taxpayer to pay the tax as a condition of challenging the law and deny recovery violates long-standing notions of fairness under the Due Process Clause. *Ward v. Love County*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930). The states should not be permitted to force a payment of tax as a condition of challenging the law and then keep the tax when the taxpayer's challenge is upheld.

One final consideration supports a requirement of retrospective relief in cases involving taxes discriminating against interstate commerce. The taxpayers who bear the burden of those taxes tend not to have the kind of in-state presence which allows a realistic opportunity to affect the political process and thereby discourage discriminatory taxes. This lack of a political voice was acknowledged by Justice Stone in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33

² For example, the taxpayers in this case and *American Trucking Association v. Gray*, each requested an escrow of protested taxes. These requests were denied. Further, taxpayers are barred from obtaining injunctive relief in the federal courts. 28 U.S.C.A. § 1341.

(1940). There, while upholding a New York tax on the sale of property shipped in interstate commerce, the Court acknowledged the absence of these normal political restraints. The Court stated:

Lying back of these decisions is the recognized danger that, to the extent the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.

309 U.S. at 46 (n. 2). Justice Rutledge made a similar point in *Nippert v. Richmond*, when he said regarding discriminatory taxation:

Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.

327 U.S. at 434. In the absence of realistic access to the political process, the state courts and this Court are the only forums available to protect the right of interstate taxpayers facing discriminatory taxation. The state courts in particular must shoulder a heavy responsibility to assure that their decisions will appropriately discourage further cases of discriminatory taxation. This goal is best achieved by mandating retroactive relief.

The present case presents an object lesson in legislative stonewalling when the courts do not require retrospective relief. Caterpillar and other interstate taxpayers have a well-grounded fear that the experience in Florida will become more common if the discipline of retrospective relief from discriminatory taxation is removed.

CONCLUSION

For the foregoing reasons, Caterpillar Inc. respectfully urges the Court to require a state to grant retrospective relief where a state tax has been imposed and collected in violation of the Commerce Clause prohibition against discriminatory taxation.

Respectfully submitted,

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APPENDIX A

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

CATERPILLAR INC.,
formerly CATERPILLAR
TRACTOR CO.,

Plaintiff,

File No. 84-9664-CM

v

File No. 87-11109-CM

STATE OF MICHIGAN,
DEPARTMENT OF
TREASURY, REVENUE
DIVISION,

OPINION AND ORDER

Defendant.

This action is brought by Plaintiff, Caterpillar, Inc., for the refund of Michigan Single Business Taxes in the amount of \$733,553.00 plus interest for the years 1981-84. The parties have filed a joint motion for summary disposition on the issue of whether the Michigan Single Business Tax Act (MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.*) is unconstitutional.

This Court holds that the Capital Acquisition Deduction (CAD), of the Michigan Single Business Tax Act (MCL 208.23; MSA 7.558 (23)), is unconstitutional on grounds that it violates the Commerce Clause (United States Constitution, Article 1, Section 8, Clause 3). Further, MCL 208.23; MSA 7.558(23) must be severed from the Single Business Tax Act and Plaintiff shall be granted prospective relief only.

Plaintiff is a foreign corporation headquartered in Peoria, Illinois and incorporated in Delaware. In 1984, Plaintiff had over 61,000 employees worldwide and sales exceeding 6.6 billion dollars. Moreover, Plaintiff paid out over 2.4 billion dollars in wages, salaries and employee benefits in 1984.

The gravamen of Plaintiff's complaint is that MCL 208.23; MSA 7.558(23) discriminates against businesses with large

out of state operations. MCL 208.23; MSA 7.558(23) was amended in 1981 and essentially provides the following formula when calculating the deduction:

$$\frac{\text{Michigan Personal Property} + \text{Michigan Payroll}}{\text{All Personal Property} + \text{All Payroll}} \times 2$$

An example of how MCL 208.23; MSA 7.558(23) discriminates against out of state corporations is apparent in the following hypothetical:

Corporation A has all of its property and payroll in Michigan and total capital acquisition purchases of \$100,000. If corporation A had Michigan personal property worth 5 million dollars and a Michigan payroll of 5 million, its CAD would be:

$$\text{\$100,000} \times \frac{5,000,000 + 5,000,000}{5,000,000 + 5,000,000} = \text{\$100,000}$$

Contrastly, Corporation B has only a small portion of its personal property and payroll in Michigan yet makes identical capital acquisition purchases of \$100,000. If Corporation B had Michigan personal property worth 5 million dollars, all personal property worth 100 million dollars and a Michigan payroll of 5 million dollars, a total payroll of 100 million dollars, its CAD on identical capital purchases would be:

$$\text{\$100,000} \times \frac{5,000,000 + 5,000,000}{100,000,000 + 100,000,000} = \text{\$5,000}$$

Although Corporation A and B made identical capital acquisition purchases in the above hypothetical, Corporation B's taxable income would be \$95,000 higher than Corporation

A's because the CAD operates to favor businesses with all or most of their operations based in Michigan. For Plaintiff in the instant case, MCL 208.23; MSA 7.558(23) has cost it \$733,553 in taxes which it would not have incurred had Plaintiff based all its property and payroll in Michigan.

The discriminatory effect of MCL 208.23; MSA 7.558(23) has been consistently ruled unconstitutional by the U.S. Supreme Court on grounds that it violates the commerce clause. In *Halliburton Oil Well Cementing Co. v Reily*, 373 U.S. 64 (1962), *reh'g denied*, 374 U.S. 858 (1963), the U.S. Supreme Court struck down a Louisiana use tax exemption which had the effect of imposing a lower use tax on property assembled in Louisiana as compared to property assembled out of state and brought into Louisiana. The Court found this exemption to be a clear violation of the Commerce Clause because it discriminated against the out-of-state manufacturer as compared to the in-state manufacturer when each engaged in the same transaction — use of identical property in the state. The same result ensues here. A Michigan company receives a greater CAD than Plaintiff when each engages in the same transaction — purchase and use of an identical piece of property in Michigan.

The Court in *Halliburton* also noted that the result of the Louisiana tax would be to provide an incentive to move assembly work into Louisiana. It then went on to state:

Disapproval of such a result is implicit in all cases dealing with tax discrimination, since a tax which is 'discriminatory in favor of the local merchant, *Nippert v Richmond*, *supra*, also encourages an out of state operator to become a resident in order to compete on equal terms. *Halliburton* 373 U.S. at 72.

Such an effect would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce clause." *Id.* at 72-73.

Halliburton is only one of a long line of cases holding it impermissible to discriminate against out-of-state businesses in favor of local interests. Most recently the U.S. Supreme Court decided *American Trucking Ass'n, Inc. v Scheiner*, 55 USLW 4988 (1987). In striking down a Pennsylvania road tax which bore less heavily on Pennsylvania based companies than out-of-state companies the Court summarized its prior decisions as follows:

Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause. *Id.* at 4993.

The greater CAD is allowed to Michigan based companies solely because of the location of their business. Under *Halliburton* and *American Trucking*, such preferential treatment is unconstitutional.

It is no defense to the unconstitutionality of the CAD to argue that while the deduction allowed a Michigan business on the purchase of property is greater than that allowed an out of state business, the Michigan taxpayer will also be subject to tax on a greater proportion of the depreciation generated by that property. The gist of this defense is that over the period of use of the property, the discrimination inherent in the CAD will be minimized.

Regarding the consideration of retroactive relief, in the last several years numerous tax cases have granted prospective relief only and in which refunds were denied. *Ashland Oil, Inc. v Rose*, 305 SE2d 531 (1986); *First of McAlester Corp. v Okla Tax Comm.*, 709 P2d 1026 (Okla, 1985); *Salorio v Glaser*, 461

A2d 1100; 93 NJ 447 (1983); *Midland Bank & Trust Co. v Olsen*, 717 SW2d 580 (1986); *Private Truck Council of America, Inc. v Maine Secretary of State*, 503 A2d 214 (1986); *Private Truck Council of America, Inc v New Hampshire*, 128 NH 466; 517 A2d 1150 (1986); *American Trucking Associations, Inc v Vermont Commissioner of Motor Vehicles*, 146 VT 579; 508 A2d 405 (1986); *Continental Railways, Inc v Director, Division of Motor Vehicles*, 102 NJ 526; 509 A2d (1986); *Metropolitan Life Ins. Co. v Comm'r of Dept. of Ins.*, 373 NW2d 399 (ND, 1985); *National Can Corp v Washington Department of Revenue*, and *Tyler Pipe Industries v Washington Department of Revenue*, 749 P2d 1286 (1988); cert den — US — ; — S Ct — ; 100 L Ed 2d 6154 (1988); *American Trucking Associations v Gray*, 746 SW2d 377 (1988); *Fla Division of Alcoholic Beverages and Tobacco, et al v McKesson Corp, et al*, 524 So2d 1000 (Fla, 1988); *National Distributing Co, Inc, et al v Fla Office of the Comptroller*, 523 So2d 156 (1988).

In Michigan the courts have also given prospective application to tax decisions. In *Washtenaw County v State Tax Comm.*, 422 Mich 346; 373 NW2d 697 (1985), the Court gave purely prospective application to its decision requiring that effects of "creative financing" be considered in valuation of real property used for equalization purposes. The court noted that the local governments had already collected and spent the tax levies at issue and the administrative burden of re-evaluation would be considerable.

The Court of Appeals in a recent decision gave only prospective application to its decision concerning the constitutionality of the insurance premium tax. In the case of *Penn Mutual Life Insurance Co. et al v Dept of Licensing et al*, 162

Mich App 123; 412 NW2d 668 (1987), the Court of Appeals held that the insurance premium tax was unconstitutional. However, the Court gave the decision only prospective effect:

. . . Refunds of the magnitude involved here would place undue hardship on the people of this state. Furthermore, the state has justifiably relied on the constitutionality of this tax and balanced the state budget accordingly. 162 Mich App at 134.

In *Chevron Oil Co., v Huson*, 404 U.S. 97 (1971), the United States Supreme Court established the controlling tests for determining whether a judicial decision should apply retroactively or prospectively. The Supreme Court stated:

[T]he decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed 404 U.S. at 106 [citations omitted].

The issue of the constitutionality of MCL 208.23; MSA 7.558 (23) is one of first impression. The U.S. Supreme Court has not invalidated a deduction provision as contrasted with an unconstitutional credit provision. *Westinghouse Electric Corp. v Tully*, 466 U.S. 388 (1984). Moreover, the issue of whether a tax deduction discriminates against out-of-state Corporations and therefore violates the Commerce Clause of the U.S. Constitution, Article 8, Section 3, presents an entirely novel question of law and is thus an issue of first impression.

In summary, MCL 208.23; MSA 7.558(23) is held to be unconstitutional as it violates the Commerce Clause of the U.S. Constitution. Further MCL 208.23; MSA 7.558(23) must be severed from the Single Business Tax Act and Plaintiff shall be awarded prospective relief only.

Date: 7-13-89

/s/ Thomas L. Brown

Thomas L. Brown,
Circuit Judge

In the Supreme Court of the United States

OCTOBER TERM, 1989

McKESSON CORPORATION, PETITIONER

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA, RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief will address the first question set forth in the Court's July 3, 1989 order:

When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

RULE 28.1 STATEMENT

Amici are certified plaintiff classes in *American Trucking Associations, Inc. v. Smith*, No. 88-325, consisting of all motor carriers whose vehicles were "subject to the Highway Use Equalization Tax embodied in Act 685 of 1983," including the following named plaintiffs:

American Trucking Associations, Inc. (ATA), an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Arkansas Motor Carriers Association, Inc., formerly the Arkansas Bus & Truck Association, Inc., an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Leon Cawood, a sole proprietor doing business as Leon Cawood Trucking.

Commercial Carriers, Inc., a wholly owned subsidiary of Ryder Commercial Transport, Inc., which in turn is a wholly owned subsidiary of Ryder System, Inc. Commercial Carriers' affiliates or subsidiaries (other than wholly owned subsidiaries) are Automotive Railhandling, Inc.; B & C, Inc.; Blazer Truck Lines, Inc.; Carrier Support, Inc.; Complete Auto Transit, Inc.; Delevan Industries, Inc.; F. J. Boutell Driveaway Co., Inc.; Fleet Carrier Corporation; Fleet Carrier Dealer Services, Inc.; Janesville Auto Transportation Company; M & G Convoy, Inc.; Murray Sandblast & Paint, Inc.; National Trucking Company; Ryder Energy Distribution Corporation; Ryder Truck Rental, Inc.; Summit Industries, Inc.; and Transport Support, Inc.

Diamond Transportation System, Inc., an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Fox Motor Transport, Ltd.; Fox Transportation, Inc.; Sed. Air, Inc.; and Snicknej Co.

Joe Fortenberry, a sole proprietor doing business as Fernwood Transportation.

Jones Truck Lines, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of JTL Holding Company.

Rollins Leasing Corporation, a wholly owned subsidiary of R.L.C. Corporation. Rollins' only affiliate or subsidiary (other than wholly owned subsidiaries) is Rollins-Matlack Administrative Services, Inc.

Transcon Lines, which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Transcon, Inc.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-192

MCKESSON CORPORATION, PETITIONER

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA, RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

American Trucking Associations, Inc., *et al.* ("ATA"), are the plaintiffs (petitioners before this Court) in the companion case to this one—*American Trucking Associations, Inc. v. Smith*, No. 88-325 ("ATA"). The questions posed by the Court in its July 3 order are not dispositive of ATA because relief in that case was denied solely on the federal law ground that *ATA v. Scheiner*, 483 U.S. 266 (1987), is not retroactive. Unlike in this case, there is no suggestion in ATA that, if this Court held *Scheiner* retroactive, the state law refund remedy invoked by ATA would be unavailable. Accordingly, there is no occasion for the Court to address in ATA the existence of a federal right to such relief. See 88-325 Reply Br. 9.

The Court's resolution of the latter issue may affect subsequent proceedings in *ATA*, however, because the Arkansas courts might on remand hold that the state law remedy is not available. Amici's right to a refund would then depend upon the existence of such a remedy as a matter of federal law. For that reason, amici have an interest in the resolution of the questions raised by the Court. More generally, *ATA* and its members frequently—and often successfully—challenge state taxes on Commerce Clause grounds. See, e.g., *ATA v. Scheiner*, *supra*; *ATA v. Goldstein*, 312 Md. 583, 541 A.2d 955 (1988); *Commonwealth of Kentucky, Transp. Cabinet v. ATA*, 746 S.W.2d 65 (Ky. 1988); *ATA v. Quinn*, 437 A.2d 623 (Me. 1981). Amici accordingly have a general interest in the availability of refunds when such challenges are successful.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has asked the parties to address whether federal law requires a state to provide some form of retrospective relief when taxes have been exacted in clear violation of the Commerce Clause. There is no categorical answer to that question. It goes too far to say that federal law *always* requires such refunds; there clearly are cases where there has been no actual or at least no material injury to interests protected by the Commerce Clause, and in which prospective relief is entirely adequate (see the discussion of *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987), at page 27, *infra*). The opposite extreme, that there is *never* a federal right to restitution of unconstitutional taxes, is equally unsound, for the reasons we set forth in the argument that follows. In our view, the proper rule is to treat restitutionary relief as the norm, while recognizing that in certain limited circumstances the taxing authority will be able to show that disgorgement of a lesser amount,

¹ Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

or prospective relief alone, is adequate to serve the relevant federal interests.

Florida's arguments do not rely primarily upon any universal rejection of retrospective relief. Instead, they focus on singular attributes of this case that were found by the Florida Supreme Court to warrant a departure from what would appear otherwise to be a general state law refund right. Though we disagree with Florida's contention, any special circumstances of this case should not be allowed to obscure the Court's analysis of the general question whether there is ordinarily a federal right to refunds of taxes exacted in violation of the Commerce Clause.

The Court should therefore approach the question it posed by considering in the first instance cases in which no equitable considerations could possibly bar refunds. Suppose that instead of taxing alcoholic beverages and favoring those made from citrus fruits, Florida taxed the sale of such fruits themselves, imposing a higher rate on citrus imported from other states than on that grown in Florida. Given the dominance of Florida citrus in the Florida market, no one could assert that this was simply a matter of an improper "exemption." Conceptually, however, the same fundamental issue of federal rights and remedies would be presented. We submit that in such a case federal law would require the State to surrender the excess tax unlawfully exacted from non-Florida growers.

The Court has traditionally structured this kind of inquiry by looking at five elements: whether the court in which suit was brought had jurisdiction; whether the plaintiff has alleged sufficient injury to confer standing; whether a cause of action exists to secure some form of redress for the wrong alleged; whether the remedy sought by the plaintiff is available to redress that wrong; and whether the defendant can show some affirmative defense to the grant of relief in the particular case. See page 12, *infra*.

Here, there is no question of jurisdiction or standing. Nor can there be any serious doubt that the cause of action requirement is satisfied. Florida permits taxpayers to challenge the legality of taxes on Commerce Clause grounds, as demonstrated by the fact that its courts adjudicated McKesson's claim on the merits and conferred prospective relief. And even if there were no state cause of action, a federal cause of action exists directly under the Constitution, as is implicit from the jurisprudence permitting injured parties to sue for vindication of rights under the dormant Commerce Clause.

The more substantial question is that of remedy: whether, in addition to providing a right to obtain prospective relief to terminate Commerce Clause violations, federal law confers a right to retrospective relief, restitutionary in nature, in appropriate circumstances. The Court has repeatedly affirmed the existence of such a right in the context of unlawful taxation (see cases cited at page 8, *infra*), stressing the inequity of any other result. It is argued in response that such equitable concerns are not persuasive because Commerce Clause rights are structural rather than personal. Not only has this distinction recently been rejected by the Court (*Davis v. Michigan Dep't of the Treasury*, 109 S.Ct. 1500 (1989)), but it overlooks the fact that it is the structural needs of the Commerce Clause that make the retrospective remedy essential.

The Commerce Clause is a response to a special problem inherent in the federal structure of our political system—the natural tendency of state lawmakers to serve the parochial interests of their constituents at the expense of the national free trade market. The mere prospect of forward-looking relief is often, as in this case, entirely inadequate to bring about discontinuance of discriminatory legislation, because it makes the violation of the Commerce Clause cost-free by permitting the State and its local interests to retain the benefits of the uncon-

stitutional law. The need for a retrospective remedy is thus great.

The costs of a disgorgement remedy are not sufficient to offset the deterrence and fairness benefits of requiring retrospective relief. First, such relief will not be required in that class of cases in which, under the *Chevron* test, a weighing of the governmental reliance interests, the relevant constitutional policies, and the equities dictates that a rule of law be confined to prospective application. Second, the financial impact is ordinarily limited to disgorgement of moneys that the government should have known were being unlawfully collected. And finally, there are many methods available to ameliorate the impact of refunds on the public fisc, including, most notably, the ability to raise through new (but nondiscriminatory) taxation the revenues needed to finance a refund.

The conclusion that federal law requires retrospective relief—including, where necessary to cure the constitutional injury, tax refunds—does not end the inquiry, for there might in a particular case be affirmative defenses to payment of any refund or to payment of the full amount claimed by the taxpayer. For example, sovereign immunity might be asserted in some cases involving state taxes. We believe that sovereign immunity is not an available defense to the federal right to retrospective monetary relief in this context. But the Court need not consider the point in this case, for it is clear that Florida has waived sovereign immunity for suits seeking refunds of the taxes at issue here, and the denial of refunds rested on wholly different grounds.

Florida's primary defense here is that, even if there is a general federal right to a refund, it should not apply to cases like this one in which the Commerce Clause violation consists of improper exemption of a relatively small group of potential taxpayers. But even if McKesson would have been required to pay nearly the same amount of tax in the absence of the unlawful exemption of in-state producers, that consideration appears inadequate to out-

weigh the federal interest in deterring the kind of discriminatory legislation at issue here.

Finally, it should be recognized that Florida's "windfall" argument is not one of general application. In many cases, of which *ATA* is an example, the Commerce Clause violation clearly causes the out-of-state taxpayer to pay far more than its fair share of the total tax burden. Accordingly, even were the Court disposed to deny relief amounting to a "windfall," the federal retrospective remedy must at a minimum operate to restore the taxpayer to a position no worse than it would have been in under a proper form of the tax.

ARGUMENT

A STATE MUST DISGORGE AND REFUND TO AN AGGRIEVED TAXPAYER THE DISCRIMINATORY COMPONENT OF A TAX EXACTED IN VIOLATION OF THE COMMERCE CLAUSE

Before proceeding with the body of the argument, we tender some preliminary observations about the way in which the Court framed the additional questions to be considered on reargument. The Court's first question places the issue in context by summarizing the key facts of this case—that the tax was paid under protest and that the tax violated clearly established Commerce Clause principles. It is important to recognize, however, that those precise facts are not necessary to establish a taxpayer's right to retrospective relief.

For example, some states do not require that taxes be paid under protest in order to preserve the taxpayer's right to a refund. In those states, there would be no reason to condition the federal right to retrospective relief upon satisfaction of such a requirement. Of course, where state law does impose reasonable procedural rules for preserving a tax refund claim, such as lodging a protest or complying with a statute of limitations, those requirements may be incorporated into federal law as valid preconditions to the availability of any federal remedy. See

Ward v. Board of County Commissioners, 253 U.S. 17, 25 (1920) (recognizing that a refund claim could be barred by "valid" local law such as a statute of limitations).

Similarly, while the extent of justifiable reliance on prior law is certainly relevant to the federal refund right, that right should not be limited to cases in which a state tax violates clearly established Commerce Clause principles. The Court's *Chevron* test contemplates retrospective relief even when a decision resolves prior legal uncertainty or embodies a new and unexpected legal rule, provided that the relevant constitutional policies and equitable considerations call for such an outcome (see 88-325 Pet. Br. 14-40). The considerations identified in *Chevron* parallel those that shape the federal right to disgorgement of unconstitutional taxes. Accordingly, if Commerce Clause principles warrant retroactive application under *Chevron*, a violation of those principles should normally give rise to the same retrospective federal remedies as a violation of "clearly established" principles.

The second question posed by the Court deals with the constitutionality of retroactive taxation of the favored class as a means of rectifying an unlawful discrimination. In theory, any obligation to grant retrospective relief could be satisfied in this manner, provided that such retroactive taxation is both practical and constitutional.² In some cases, however, this alternate remedy simply will not be available. The facts of the companion case to this one—*American Trucking Associations, Inc. v. Smith*, No. 88-325 ("ATA")—illustrate the potential practical problems.³ Where the alternative of raising the taxes of the

² Even where this approach would be administratively practicable, we have serious doubts as to its constitutionality.

³ Retroactive taxation of the favored class of Arkansas-based trucks is not practical because records simply do not exist from which their Arkansas highway mileage could be calculated. Most of these vehicles satisfied the HUE tax by paying the flat \$175

benefited class is not available, any federal obligation to afford retrospective relief would have to be discharged by providing refunds to taxpayers victimized by the unconstitutional discrimination.

A. This Court Has Recognized In A Variety Of Contexts That Retrospective Relief Is Essential To Remedy A Violation Of The Constitution

There is nothing novel or surprising in the principle that unconstitutional taxes must ordinarily be refunded to those from whom they were wrongfully exacted. To the contrary, a long line of this Court's decisions—each unanimous—requires disgorgement of taxes exacted in violation of the Constitution. In *Carpenter v. Shaw*, 280 U.S. 363 (1930), for example, the Court held that “a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.” *Id.* at 369. And in *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928), the Court made the point in unmistakable terms: “[A taxpayer] cannot be deprived of its legal right to recover the amount of the tax[es] unlawfully exacted of it by [a] later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.” 276 U.S. at 504-505; see also *Jackson County v. United States*, 308 U.S. 343, 350-351 (1939); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931); *District of Columbia v. Thompson*, 281 U.S. 25, 31-33 (1930); *Ward*, 253 U.S. at 24; *Atchison T. & S.F.R.R. v. O'Connor*, 223 U.S. 280, 285 (1912). The lower federal courts have recognized the continued vitality of this principle. *United States v. State Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), cert. denied, 454 U.S. 896 (1981);

amount; moreover, because many of them were operated only within the State, they did not have to maintain mileage records for purposes of the fuel use tax.

Gallagher v. Evans, 536 F.2d 899, 900-901 (10th Cir. 1976).⁴

No sound reason exists for the Court to repudiate this long line of precedent. These cases have sound jurisprudential moorings that justify—indeed, mandate—continued adherence to the principle that federal law requires that a taxpayer be afforded retrospective relief. There may be exceptions to this general principle, as where the three-part *Chevron* test allows prospective-only application of the rule, or perhaps even where retrospective relief would produce an unjustified windfall. But the possibility of exceptions does not undermine the legitimacy of the general principle.

The federal right to retrospective relief is not limited to unconstitutional taxation. In *Owen v. City of Independence*, 445 U.S. 622 (1980), for example, the Court held that a city is not entitled to qualified immunity from damages liability in an action under 42 U.S.C. § 1983. The Court reached that result in large part because it was consonant with general remedial principles. Thus, the Court observed that “[a] damages remedy against the offending party is a vital component” of any remedial scheme (445 U.S. at 651). The Court added that “[i]t

⁴ Contrary to the assertion (Br. 8) of amici NCSL, *et al.*, *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929) (per curiam), does not undermine the holdings of *Ward*, *Carpenter*, and their progeny. *Ohio Oil* was a case in federal court that involved state law as well as federal constitutional challenges to a state tax. The Court granted a preliminary injunction barring enforcement of the tax during the pendency of the action, noting “the entire absence under local law of any remedy enforceable by the plaintiff if the tax be paid and afterwards held invalid by the final decree.” 279 U.S. at 815. Because any federal refund right would not extend to the pendent state law claims, *Ohio Oil* is not inconsistent with the existence of such a right. In any event, there is no basis for inferring from the Court's opaque per curiam disposition of this request for preliminary relief a considered analysis and rejection of the principle set forth in *Ward*; to the contrary, only 10 months later the Court reaffirmed that principle in *Carpenter*.

hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. * * * Elemental notions of fairness dictate that one who causes a loss should bear that loss." *Id.* at 654; see also *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971); *id.* at 407-409 (Harlan, J., concurring).

The Court concluded in *Owen* that these general remedial considerations apply with particular force when government acts in violation of the Constitution. "[T]he importance of assuring [the] efficacy [of a scheme for vindicating constitutional rights] is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." 445 U.S. at 651. In this situation especially, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights * * * have been violated." *Id.* at 655; see also 88-325 Pet. Br. 12-13.

Similar principles underlie the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Court there held that even if government discontinues action held to be a taking, thereby providing the property owner with the equivalent of prospective relief, the Constitution nevertheless requires provision of a retrospective remedy. "[N]o subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321.⁵

⁵ Florida (Br. 9-13) and the NCSL (Br. 17-18, 24-25) place heavy reliance on cases indicating that, insofar as *prospective* relief is concerned, states are entitled to remedy equal protection violations by eliminating the unlawful discrimination. These cases are entirely beside the point, for nothing in them rules out the potential need for retrospective relief. Indeed, if the question were squarely presented we doubt that this Court would deny a restitutionary remedy to, for example, victims of a racially discriminatory

Although the Court has not had occasion in recent years to invoke the rule set forth in *Ward* and *Carpenter*, it has indicated that the general remedial principles discussed above are fully applicable in the context of taxes violative of the Commerce Clause. For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), Hawaii argued that the Court did not have to reach the merits of the Commerce Clause challenge to a state tax because the exemptions at issue were severable from the rest of the statute. The Court rejected the contention, noting that "the challenged exemptions have now expired and 'severance' would not relieve the harm inflicted during the time the wholesalers' imported products were taxed but locally produced products were not." 468 U.S. at 267-268 n.7. In other words, the elimination of discrimination for the future did not provide all of the relief to which the plaintiffs were entitled; some form of retrospective relief also was necessary. As we now discuss, this conclusion is well founded in the general legal principles governing the availability of remedies under the Constitution.

B. Federal Law Supplies A Disgorgement Remedy To Taxpayers Forced To Pay A Tax That Violates The Commerce Clause

Many states have statutes authorizing refunds of illegally collected taxes. See Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Law. 103, 126-127 (1987). But even if a state has such a statute, state law may not authorize retrospective relief in all circumstances. For example, the Florida refund statute generally requires refunds of taxes found to be unlawful, including those held violative of the federal Constitution. See Fla. Stat. § 215.26 (1988); *State ex rel. Victor Chemical Works v. Gay*, 74 So.2d 560, 564 (Fla. 1954); see also *Ostendorf*

tax or of a charge only to women for state services provided to both men and women.

v. *Turner*, 426 So.2d 539, 545 (Fla. 1982); *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343 (Fla. 1978); *Department of Revenue v. Page*, 541 So.2d 1270 (Fla. Ct. App. 1989). Nevertheless, the Florida Supreme Court held that a refund was unavailable in the present case on the ground that it would amount to "a windfall, since the cost of the tax has likely been passed on to [McKesson's] customers." J.A. 430.

When a state tax is found to violate the Commerce Clause and that ruling is held retroactive as a matter of federal law, but retrospective relief is not available under state law, the question arises whether the Constitution itself entitles the taxpayer to retrospective relief in the form of disgorgement of the illegally exacted taxes. We submit that the Constitution does ordinarily so require, although there may be circumstances in which such relief could properly be withheld, and the amount of refund might be less than the full amount of the tax. See page 27, *infra*.

A party's right to invoke the judicial process to obtain a particular type of relief depends upon the satisfaction of several different prerequisites. *Davis v. Passman*, 442 U.S. 228, 234-249 (1979); *Bivens*, 403 U.S. at 399-407. First, the court in which the action is instituted must have subject matter jurisdiction over the claim. Second, the party invoking the court's jurisdiction must have standing to maintain the action. Third, the plaintiff must have a cause of action—he must be "a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis*, 442 U.S. at 239-240 n.18. Fourth, the remedy sought by the plaintiff must be a permissible form of relief. And, fifth, the plaintiff must be entitled to that remedy on the facts of the particular case.

McKesson's claim easily satisfies the first two requirements. There is no dispute either that the Florida court in which McKesson instituted the action had jurisdiction to entertain McKesson's claims or that the controversy

between McKesson and the State was and is sufficiently concrete and adverse to support standing.

Moreover, in considering the issue in this case the Court should put to one side the question whether a state may assert an affirmative defense of sovereign immunity to defeat the federal obligation to disgorge unconstitutionally exacted taxes. The existence of such a defense would, of course, be a question of federal law (see *Martinez v. California*, 444 U.S. 277, 284 (1980)), and we are doubtful that federal law ever would recognize such a defense in view of the strong policies underlying the disgorgement remedy (see pages 15-22, *infra*). See *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908); *Private Truck Council of Am., Inc. v. New Hampshire*, 517 A.2d 1150, 1156 (N.H. 1986) ("policy considerations inherent in the doctrine [of sovereign immunity] require that sovereign immunity not bar a common law claim for refunds when the State has been given fair notice that the taxpayer protested payment of the tax").

But where a state has not asserted its sovereign immunity to bar tax refunds, the issue does not even arise. And that is precisely the situation here. As noted, Florida has generally agreed to refund illegally exacted taxes, and it is clear from the decision below that the grounds relied on would be equally available in the case of a county or city tax. Since Florida has not invoked its sovereign immunity to bar judicial resolution of tax refund claims, there is no reason that it should be accorded a sovereign immunity defense as a matter of federal law.

Against this background, we turn to the elements of a taxpayer's claim that are at issue in this case.

1. The Cause of Action Requirement Is Satisfied in This Case

This Court has observed that "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant

may be entitled to receive. The concept of a 'cause of action' is employed specifically to determine who may judicially enforce * * * rights or obligations." *Davis*, 442 U.S. at 239; see also *Bivens*, 403 U.S. at 397; *id.* at 400-402 (Harlan, J., concurring). "A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the 'preconditions' for such equitable remedies." *Davis*, 442 U.S. at 239-240 n.18.

It is plain that Florida law supplies the requisite cause of action here. Florida has specifically authorized its taxpayers to enforce in its courts all substantive rights to be free from improper taxation, whether conferred by state or federal law. See pages 11-12, *supra*. The decision in this case, where the state courts adjudicated McKesson's Commerce Clause claim on the merits and awarded prospective relief, establishes beyond any doubt the existence of the state cause of action.⁶

If there were a state that did not provide a cause of action to enforce rights under the Commerce Clause, there would nevertheless be a federal cause of action implied directly under the Commerce Clause. This Court has repeatedly concluded that an implied cause of action is available with respect to constitutional protections that are judicially enforceable. *Davis*, 442 U.S. at 242-243; *Bivens*, 403 U.S. at 397; *id.* at 400-401 (Harlan, J., concurring); *Bell v. Hood*, 327 U.S. 678, 684 (1946). The rationale of those decisions applies in this context as well. Absent an implied cause of action, a taxpayer could not obtain prospective injunctive relief against an ongoing violation of the Commerce Clause—a result that Florida, Arkansas, and their amici do not and could not defend. Whether a taxpayer seeks prospective or retrospective

⁶ It is similarly clear in *ATA* that Arkansas law provides an analogous cause of action. See 88-325 Reply Br. 9.

relief for a Commerce Clause violation, the cause of action is precisely the same.

2. *The Constitution Requires a Disgorgement Remedy in Appropriate Cases*

Once a cause of action exists, the next essential questions are whether the Constitution ever requires the restitution of unconstitutionally exacted taxes, and, if so, whether it does so in the particular case. To the extent the Constitution does mandate such a remedy, a court adjudicating a Commerce Clause challenge in the context of a state law cause of action would be obliged to make the remedy available with respect to taxes collected in violation of the Commerce Clause. See *Carpenter*, 280 U.S. at 369 ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment"); cf. *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 109 S.Ct. 633, 639 (1989) (the Constitution bars a state from limiting a taxpayer to the remedy of seeking to raise the taxes of others; the state itself must provide a remedy for the unconstitutional discrimination).⁷ Similarly, a remedy required

⁷ This is how the commentators have read *Carpenter* and related cases. See, e.g., Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 294 n.97, 297 n.111 (1984) (citing *Ward*: "[S]ome federal rights require provision of an adequate state remedy. * * * [S]tate courts are required by the Constitution to provide adequate remedies for constitutional guaranties * * * [, including] appropriate restitutionary relief for breach of federally imposed duties"); Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883, 939, 972-973 n.394 (1986) (citing *Ward*: "The Court * * * sometimes * * * has said that states must provide a remedy but has left to the states the choice of what remedy to provide. * * * [T]he federal system chose to rely on state remedies to recover illegally exacted taxes. A state rule that no recovery was possible, however, transgressed federal purposes and was not an acceptable rule"); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 955 (1988) (citing *Ward*: "the Supreme Court has compelled state courts to provide constitutional remedies even when state law conferred no

by the Constitution would be available to a taxpayer who invokes the federal cause of action described above.

The powerful commonsense support for a disgorgement remedy can best be illustrated by comparing the present case with one in which a taxpayer has refused to pay a tax on the ground that it violates the Commerce Clause. Cf. *Ashland Oil, Inc. v. Rose*, No. 88-421 (juris. statement filed Sept. 9, 1988). Assume that the state court adjudicating a collection action held that the tax in question was unconstitutional but nevertheless ruled that it had to be paid. We think it clear that, unless the state could invoke some federally recognized ground such as nonretroactivity under *Chevron*, federal law would protect the taxpayer from being forced to pay a tax concededly unconstitutional under the Commerce Clause. A taxpayer who paid the very same tax under protest should not be disadvantaged vis-a-vis one who has resisted paying the tax at all. To the extent that the latter cannot be compelled to pay the unconstitutional tax, so the former should be entitled to restitution of the illegally exacted tax.

Arkansas (Br. 23-28), Florida (Br. 13-14), and the NCSL (Br. 21-23) argue that there is no right to retrospective relief in this context, because the Commerce Clause does not confer private rights but is instead a structural provision of the Constitution. Even if this characterization of the Commerce Clause were correct,

authority for them to do so"); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 228 (1981) ("[T]he Court has held in several cases that the Constitution * * * requires the state court to give relief. In *Ward* * * *, for instance, the Court ruled that an Oklahoma court was constitutionally obligated to give the remedy of damages"); Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. Rev. 100, 151 (1985) ("the primary significance of [*Ward*] may be its support of the proposition that state courts have a constitutional obligation to provide adequate remedies for federal rights").

which it is not,⁶ it would provide no basis for concluding that retrospective relief is unavailable. It is undisputed that aggrieved individuals may obtain declaratory and injunctive relief against discrimination that violates the dormant Commerce Clause. This is a complete answer to the contention that affirmative relief may never be awarded at the instance of those victimized by such violations. Prospective relief is available because courts have concluded that such a remedy is appropriate to ensure compliance with the Commerce Clause. *Bell v. Hood*, 327 U.S. at 684. If, as we show below, the same

⁶ This Court recently rejected a similar argument that "structural" constitutional principles do not give rise to individual rights. In *Davis v. Michigan Dep't of the Treasury*, 109 S.Ct. 1500 (1989), a case involving intergovernmental tax immunity, the State argued that an individual taxpayer could not claim the protection of the immunity doctrine in seeking a tax refund because its purpose was "to protect governments and not private entities or individuals" (*id.* at 1507). The Court disagreed, holding that an individual could maintain such a claim: "It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary" (*ibid.* (citations omitted)). The same conclusion plainly applies here as well.

In fact, the contrary argument is semantic, not substantive. The rights conferred by the Commerce Clause, like those conferred by many other provisions of the Constitution, are both structural and personal. For example, the Establishment Clause is even more purely "structural" than the Commerce Clause, yet it cannot be doubted that individuals injured by violations of that provision may sue to secure redress of their injuries. Similarly, the protection of the Free Speech Clause typically is viewed as conferring a personal right, but the right also can be described as a structural one, securing robust political debate in order to promote the political well-being of the Nation. In like fashion, the right of individuals under the dormant Commerce Clause to participate in a national market free of discriminatory state regulation similarly can be characterized as a structural right or as the personal right to be free of discriminatory state regulation not authorized by Congress.

is true for retrospective monetary relief, such a remedy also would be warranted.⁹

The question whether a remedy should be recognized in a particular circumstance "must be resolved by weighing [its] costs and benefits." *United States v. Leon*, 468 U.S. 897, 907 (1984). The benefits of a retrospective remedy in the context of taxes found to violate the Commerce Clause far outweigh the costs associated with such a remedy.

We already have discussed the relevant Commerce Clause policies and the need for deterrence in considerable detail (see 88-325 Pet. Br. 28-33; 88-325 Reply Br. 16-17) and reiterate only the most salient points here. The overriding purpose of the Commerce Clause is to open up the channels of national commerce and prevent the states from favoring in-state over out-of-state businesses. See, e.g., *New Energy Co. v. Limbach*, 108 S.Ct. 1803, 1807 (1988); *Lewis v. BT Investment Man-*

⁹ It is well settled that this Court will recognize a retrospective remedy for violations of a constitutional right where that remedy is warranted to ensure effective deterrence of violations of the right. Thus, the exclusionary rule applicable to evidence obtained in violation of the Fourth Amendment "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Similarly, the Court has shaped the remedy provided by the First Amendment overbreadth doctrine to ensure that the adoption of unconstitutional laws is not "cost free." *Massachusetts v. Oakes*, 109 S.Ct. 2633, 2639-2640 (1989); see generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1149 (1969).

The debate over the exclusionary rule has focused principally on whether the rule is appropriate in view of its costs and benefits, not on the Court's power to require that such a remedy be made available in order to deter violations of the Fourth Amendment. To the extent the latter issue is subject to dispute, it is because of the nontraditional nature of the suppression remedy. "A court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies" (*Bivens*, 403 U.S. at 408 n.8 (Harlan, J., concurring) (emphasis added)); the remedy of disgorgement surely falls within that category.

agers, Inc., 447 U.S. 27, 44 (1980); *Nippert v. Richmond*, 327 U.S. 416, 425-426, 434-435 (1946); *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

This Court has recognized on numerous occasions that the political structure established by the Constitution carries an inherent incentive for the states to engage in the very economic protectionism that the Commerce Clause prohibits. As it said in invalidating a discriminatory tax on itinerant salesmen:

Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.

Nippert, 327 U.S. at 434-435. Accordingly, "to the extent that the burden [of economic regulation] falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 46 n.2 (1940). See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-768 n.2 (1945); *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938).

Commentators also have pointed out the hydraulic pressures for economic legislation that discriminates in favor of local interests. For example, Professor Tribe has observed that

state and local lawmakers are especially susceptible to pressures which may lead them to make decisions harmful to the commercial interests of those who are not constituents of their political subdivisions. That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers is to protect and promote the interests of their own constituents.

L. Tribe, *American Constitutional Law* § 6-5, at 409 (2d ed. 1988) (emphasis in original). See also R. Posner, *Economic Analysis of Law* § 26.3, at 602 (3d ed. 1986) (“[e]ach state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states”).

The threat of prospective invalidation of a particular tax statute under the Commerce Clause is not alone sufficient to counter the states’ powerful structural incentives to discriminate against out-of-state interests. A state considering whether to adopt a statute of doubtful constitutionality, or even a plainly unconstitutional one, would retain every reason to do so: it would be able to keep all of the taxes it managed to exact before the statute was challenged and invalidated by a court; and local interests would enjoy an unimpaired advantage during that period.

The facts of both this case and *ATA* demonstrate that the states do in fact act in precisely that manner. See 88-325 Pet. Br. 30-33. Indeed, one Florida legislator specifically referred to the absence of a refund remedy in urging his colleagues to replace one discriminatory tax on alcoholic beverages with a new one that was equally offensive to the Commerce Clause. 88-192 Pet. Br. 15-16.

In order to curb this tendency to enact statutes that discriminate against interstate commerce, it is essential that the states’ economic incentive be eliminated. Retrospective disgorgement relief “serve[s] as a deterrent against future constitutional deprivations” and provides an “incentive” for governmental decisionmakers “to err on the side of” complying with the Constitution. *Owen*, 445 U.S. at 651-652; see also *Tatarowicz*, 41 Tax Law. at 141-142; *Wolcher*, 69 Calif. L. Rev. at 310. Precisely this point was made by a majority of the Court in concluding that a First Amendment overbreadth challenge to a criminal statute may be maintained even though the statute has been repealed. *Massachusetts v. Oakes*, 109

S.Ct. at 2639-2640 (opinion of Scalia, J.) (emphasis added):

[T]he argument is made that it is senseless to apply this doctrine when the protection of other conduct can no longer be achieved, which is the case when the statute has already been amended to eliminate any unconstitutional “chilling” of First Amendment rights. Even as a policy argument, this analysis fails. The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post*, that is, after the offending statute is enacted, but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact. *If the promulgation of overbroad laws affecting speech was cost free, as the plurality’s new doctrine would make it—* that is, if no conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal—*then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place.* When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be “chilled” as a consequence of the rule the plurality would adopt.

The same considerations refute the argument that prospective remedies suffice to meet the needs of the Commerce Clause.

In addition, the fundamental unfairness of preventing a taxpayer from recovering funds unlawfully taken from him by the state weighs in favor of recognizing a disgorgement remedy. See *Ward*, 253 U.S. at 24 (“[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law”); see also *District of Columbia v. Thompson*, 281 U.S. at 31 (citing *Ward* for

the principle that government must make restitution of funds held "in its treasury . . . which it has no right in equity, good conscience, or common honesty to retain").¹⁰

The sole factor on the cost side of the ledger is the financial impact on governmental entities of the obligation to disgorge unconstitutionally exacted taxes. It is true that the disgorgement remedy may sometimes result in repayment obligations that appear large when viewed in absolute terms, but several factors reduce considerably the weight that should be accorded to this interest. First, *Chevron* directs that these same considerations be weighed in determining whether to accord a ruling retrospective effect. Consequently, the issue of refund relief will not even arise unless the financial burden argument already has been found wanting. It accordingly should not be sufficiently weighty to preclude recognition of a disgorgement remedy.

Second, merely requiring the return or repayment of funds paid to the state may be less burdensome than obliging a state to pay damages, which could subject it to monetary liability well beyond its revenues and would require use of funds that the state rightfully acquired in the first place. As Professor Wolcher has explained (69 Calif. L. Rev. at 309-310):

[A] state has little legitimate reason to object to a constitutionally implied remedy in state court in cases where the plaintiffs seek the return of property or the refund of money that the state has unconstitutionally taken from them. . . . A state court should give appropriate relief in such a case because the fiscal integrity of the state is at best minimally affected by the remedy. . . . The state is simply being asked to give value for equivalent value taken

¹⁰ The availability of the restitutionary remedy also would encourage taxpayers to pay their taxes and sue for a refund rather than forcing the government to institute collection actions, thereby promoting orderly adjudication of tax disputes.

and retained. Hence the net value of the fisc remains unimpaired.

.

[The state] is only being asked to pay back money which the plaintiff claims it had no right to collect in the first place. The action in substance presents a claim of unjust enrichment against the state that does not threaten the integrity of its general revenues.

See also *Ward*, 253 U.S. at 24.

Third, there is considerably less reason to be solicitous of a state's financial concerns where the question involves the state's obligation to return money it had no right to exact in the first place. The state chose a course of action that might result in the invalidation of its tax, and protection of the relevant constitutional interests requires that it bear the risks associated with that decision. See 88-325 Pet. Br. 33-35. Given that the controlling rule of law is entitled to retroactive application under *Chevron*, the state can claim no reliance interest that would allow it to keep the unconstitutionally exacted tax.

Fourth, the state's ability to finance any refund through the adoption of new, nondiscriminatory taxes ameliorates considerably any possible financial burden. The state simply would serve as a conduit for rectifying the past discrimination. In addition, the financial impact of a refund would not have to be borne in a single year but could be spread out over a period of years by such means as paying the refunds in installments or financing them through long-term bonds. See 88-325 Pet. Br. 36-38.

Weighing the modest cost against the undeniable—and essential—deterrence provided by an appropriate disgorgement remedy in the Commerce Clause context, it is clear that the Court should reaffirm the availability of the remedy recognized in *Carpenter* and similar cases.

The parallels between the tax refund context and the situation in which there is a governmental taking of

private property requiring payment of just compensation support the conclusion that a disgorgement remedy is appropriate here. See *Ward*, 253 U.S. at 24 (characterizing the county's refusal to provide refunds as a "tak[ing]" of the taxpayers' property). In both circumstances the individual is deprived of ownership or use of property under the compulsion of governmental authority, but, upon judicial examination, the government is held to have had no right to act as it did.

In the takings situation, the government must either discontinue its conduct for the future or pay just compensation for the full value of the property; but whichever course it chooses, *First English Church* holds that it must return to the property owner the value of the property taken prior to the judicial determination. The analysis here is informed by the Framers' conclusion—embodied in the Takings Clause—that government is not entitled simply to restore the property to its owner for future use. Instead, it must make restitution (in the form of just compensation) for the value taken prior to restoration of the property. In the taxation context, government should have a comparable obligation not only to stop levying the unconstitutional tax, but to restore the taxpayer to the position it would have enjoyed but for the unlawful exaction of the tax.

3. The Scope of the Restitutionary Remedy

We have shown in the preceding discussion that the federal remedy for taxation that violates the Commerce Clause includes, in appropriate cases, disgorgement by the taxing entity of sums that were discriminatorily exacted. Nothing in the opinion of the Florida Supreme Court and little in the State's brief really disputes these conclusions. The heart of the State's defense is quite different: because McKesson allegedly did not pay significantly more tax than it would have if the exempt Florida products had been fully taxed, and because McKesson allegedly "passed on" the tax to its customers in the form

of higher prices, it is argued that a refund is not required because it would be an unjust windfall. This is not an argument about the existence of a general right to retrospective relief; rather, it addresses whether the general right is applicable to the particular circumstances of this case. It also raises questions about the extent of the disgorgement that should be required in various situations.

As noted at the outset, it is essential to appreciate, in thinking about this problem, that McKesson's situation is not prototypical of all constitutional tax refund claims. For example, a tax such as Florida's liquor tax or a general sales tax varies directly with the quantity of product sold. Whatever might be said about the likelihood of passing on such taxes, there is no comparable basis for assuming that other types of taxes, such as the corporate franchise tax at issue in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), or the flat highway taxes struck down by *Scheiner*, would be passed on to the taxpayer's customers.¹¹

¹¹ Traditionally, the pass-on doctrine has been limited to the sales tax context, in which the legal incidence of a challenged tax falls not on the seller of goods but on the purchaser. In such circumstances, the plaintiff seller, which merely collected and remitted the tax, is sometimes confined to prospective relief. See, e.g., *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529, 532 (Fla. 1973).

In any event, the assertion of the Florida Supreme Court in this case that McKesson had passed on its taxes is rife with problems. To begin with, it represents a factual conclusion arrived at without notice to McKesson that the matter was in issue and without opportunity for a factual hearing. Beyond that, the conclusion is improbable. A tax, like any other increased cost of business, will be "passed on" in the form of increased prices only to the extent that economic factors, such as highly inelastic demand, permit. Any attempt to pass on tax costs by raising the price of a product will adversely affect sales and profitability, and would be especially impractical where the taxpayer is competing with producers whose goods are taxed at a reduced rate. At least in the case of flat highway taxes, efforts by states to resist refunds on a "pass-on" theory have been unsuccessful. *ATA v. Conway*, No. 88-156 (Vt.

Moreover, the extent to which it could be said that a refund of an unconstitutional tax would confer a windfall varies substantially with the circumstances of particular cases. Thus, a state might impose a tax on activity that is entirely immune from taxation, such as a direct tax on importation of goods from another state or a tax on income derived from federal government securities.¹² In such a case, a full refund of the illegitimate tax would entail no element of windfall for the taxpayer.

Florida's windfall argument would also have no place in many cases in which a tax is imposed on a properly taxable transaction but in a discriminatory manner. In *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), for example, New York sought to encourage use of New York stock exchanges by imposing a tax on the transfer of securities that was twice as high for a sale occurring on an out-of-state exchange as it was for a sale occurring in New York. Because the vast majority of stock sales with any New York nexus occurred on New York exchanges, the class of taxed out-of-state transactions disfavored by the scheme was small. In such a case, it is clear that the out-of-state transaction has been subjected to an additional, discriminatory tax, rather than the in-state transaction having received an improper "exemption." Florida's argument that the discrimination had no material effect on the victim's tax liability would be wholly inapplicable in this type of circumstance.

The fact that there are bound to be many cases of this sort, combined with the general desirability of enforcing

Aug. 25, 1989), slip op. 12-13 (copy lodged with Clerk of this Court); *ATA v. Kline*, No. 07-14-1667-85 MVT (N.J. Tax Ct., Sept. 8, 1988) (copy lodged with Clerk of this Court); *Ryder Truck Rental, Inc. v. Revenue Cabinet*, No. K 88-R-38 (Ky. Bd. Tax App., June 16, 1989) (Order No. K-12811).

¹² Vermont did something comparable when it imposed a tax on out-of-state trucks for the privilege of entering the State. See *ATA v. Conway*, 508 A.2d 405 (Vt. 1986), cert. denied, 483 U.S. 1019-1020 (1987).

Commerce Clause requirements effectively, suggests that the normal rule should be that the government must restore to the victim of a discriminatory tax the amount necessary to undo the discrimination. But this rule is not absolute. Rather, the taxing authority should be permitted to show that particular circumstances exist that make it unnecessary or inequitable, as a matter of federal law, to grant any or all of the relief requested. Cf. *Lemon v. Kurtzman*, 411 U.S. 192, 203-206 (1973).

Such a defense would be at its strongest in cases in which the objection to a tax is purely theoretical, and the taxpayer can demonstrate no actual discrimination. The Washington tax at issue in *Tyler Pipe* is an example. That tax, which was imposed on the manufacture or wholesaling of goods in the State but exempted those doing both from paying both taxes, was held to violate the Commerce Clause because it lacked internal consistency—i.e., its structure raised a theoretical possibility that, if other states adopted the same tax, those who manufactured in one state and sold in the other would be subjected to multiple taxation. The Court indicated (483 U.S. at 249) that the defect could be cured by granting a credit for taxes imposed in another state on a multistate transaction. In fact, however, the taxpayers apparently incurred little or no actual double taxation and would have paid virtually the same tax to Washington even if such a credit mechanism had been in place. See *National Can Corp. v. Department of Revenue*, 749 P.2d 1286, 1292 (Wash.), appeal dismissed & cert. denied, 108 S.Ct. 2030 (1988). In such a case, where there has been no actual discrimination and no increased tax burden on interstate business, refund relief would not appear to be required either in fairness to the taxpayer or in order to remedy actual injury to Commerce Clause interests.

Other cases of unconstitutional taxation in violation of the Commerce Clause array themselves at intermediate points along the spectrum. This is true of both *McKesson*

and *ATA*, which differ from the extremes discussed above and also from one another. Both cases involve significant unlawful discrimination between in-state and out-of-state products or businesses; but *ATA* also involves a far greater adverse impact on the actual tax burden of the out-of-state businesses.

In *McKesson*, the decision of the Florida Supreme Court refusing to refund the difference between what in-state and out-of-state producers were taxed plainly fails to undo the effects of the discrimination. Moreover, the undeniable tendency of such decisions is to embolden state legislators to continue in the future to satisfy the parochial demands of their constituents and ignore the dictates of the Commerce Clause. Florida does not really deny these untoward consequences but instead stresses that, because of the relatively small volume of in-state products given favored treatment, the discrimination in tax rates had relatively little impact on the overall tax burden of out-of-state producers. Therefore, Florida argues, a refund of the full amount of the discrimination would relieve out-of-state producers such as *McKesson* of a substantial portion of their fair tax burden and for that reason could be seen to constitute an inappropriate windfall.

On balance, for the reasons set forth more fully above in discussing the availability of a restitutionary remedy, we submit that the need to provide meaningful deterrence of Commerce Clause violations is the more powerful of these two competing concerns. Therefore, full retroactive rectification of the discrimination is proper in *McKesson*. But even if the Court were to accept Florida's argument that the right to a refund should not extend to taxes that would have been paid anyway under a non-discriminatory regime, it would not follow that there is never any federal right to a refund—only that such a right is not available to the extent it would confer a significant windfall. In other words, even if there is no right to retrospective eradication of the discrimina-

tion, the state should, at a minimum, restore to the taxpayer sums exacted in excess of the taxpayer's fair share of the total tax burden.¹³

The Arkansas HUE tax illustrates this point. A survey prepared in the *ATA* case indicated that the average Arkansas-registered heavy truck paid about 1¢ per mile of operations (88-325 J.A. 68, 139, 144), whereas the majority of non-Arkansas-registered trucks, which operated fewer than 3,500 miles annually in the State, were required to pay 5¢ per mile. When the HUE tax was finally repealed in the wake of Justice Blackmun's escrow order, it was replaced with a 2.5¢/mile tax that varied only with miles of operation and contained no discriminatory cap benefiting more extensive users. Ark. Code Ann. § 27-35-205(f). These figures demonstrate that non-Arkansas truckers were subjected to substantial discrimination because many of them paid five times as much per mile as equally heavy Arkansas-registered trucks. But even more important, the Arkansas tax forced out-of-state truckers to shoulder not only the tax load fairly attributable to their own operations but a large part of the burden related to the operations of in-state truckers.

Accordingly, in the discriminatory taxation context, the minimum remedy required to respond to an unconstitutionally discriminatory tax is disgorgement of so much of the unlawful tax as is necessary to ensure that the taxpayer has not carried more than its fair share of the total tax burden. Such amounts cannot be characterized as a windfall, as taxes that the victimized taxpayer should in fairness have paid in any event, or as being inequitable in any other respect.

¹³ The fair share of any taxpayer victimized by unconstitutional discrimination would be determined by computing how much the taxpayer would have paid if the state had raised the same amount of money through a nondiscriminatory tax.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

McKESSON CORPORATION,
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF ON REARGUMENT OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL LEAGUE OF CITIES,
NATIONAL GOVERNORS' ASSOCIATION,
U.S. CONFERENCE OF MAYORS,
NATIONAL ASSOCIATION OF COUNTIES, AND
INTERNATIONAL CITY MANAGEMENT ASSOCIATION;
JOINED BY THE MULTISTATE TAX COMMISSION
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The Court's July 3, 1989, order directed the parties in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, No. 88-192, to brief the following questions:

1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

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INTEREST OF THE AMICI CURIAE

The institutional interest of *amici* in cases affecting state and local governments is set out in the first brief that we filed in this case.¹ We add only that a partial survey of the States conducted this summer by *amicus* Multistate Tax Commission found that 30 States potentially are liable for more than \$6.5 billion in refunds on constitutionally based claims. Because these claims will proceed in state court under state causes of action pursuant to state waivers of sovereign immunity, the States have a compelling interest in the use of their own remedial rules in their adjudication. *Amici* therefore submit this brief to assist the Court in the resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

We do not suggest that state courts either do or should routinely deny refunds to taxpayers who pay taxes that subsequently are held to be unconstitutional; to the contrary, as we explained in our first brief, state courts typically make refunds available as a matter of course in such circumstances. In our view, however, the availability against a State of retrospective monetary relief in a state cause of action adjudicated in state court should be determined by state, rather than federal, law.

1. As an initial matter, the Constitution does not generally guarantee the availability of monetary relief for violations of federal constitutional or statutory law. From its inception, our system has recognized sovereign and official immunities that may make it impossible for injured parties to obtain money damages. Against this background, petitioners' peculiar argument that there is a special constitutional right to the refund of taxes that are collected in violation of the Constitution is without merit. Not surprisingly, the decisions that petitioners cite for this proposition either are inapposite or are inconsistent with modern law.

¹ The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

2. Whether a refund is available in a suit such as this one is a matter of state law. The decision whether to waive sovereign immunity and permit an action for a refund in the first instance is constitutionally committed to the State. Related, subsidiary issues—the scope of the State's waiver, the meaning of procedural and substantive limitations on relief (such as statutes of limitations), the availability of particular elements of relief (such as interest)—necessarily also are committed to the State. By the same token, the interpretation of other remedial rules, such as those governing retrospectivity, should be matters of state law to be settled by the state courts. That this Court has mandated the use of particular injunctive remedies (such as the exclusionary rule) to effectuate constitutional rights in other settings is beside the point here: in the context of suits against a sovereign for money damages, the Constitution itself permits the States (or the United States) to determine the scope of available relief.

3. Even if the availability of money damages in a state court action against a State is not *necessarily* a matter of state law, compelling prudential considerations militate against the implication of a damages remedy from the Constitution. Any federal court, including this one, should be reluctant to take the unprecedented step of authorizing monetary relief against a State in a case where the state courts believe money damages unavailable—particularly when *Congress* has chosen not to make States generally liable for the violation of constitutional rights. Institutional considerations also suggest that the Court should hesitate before constitutionalizing the rules governing money damages, a course that would require the Court to assess the constitutionality of every state retroactivity and remedial rule.

Nothing in the Commerce Clause requires the Court to take such a step. When a constitutional challenge involves the denial of equal treatment—that is, when the State had the authority to impose the challenged tax on the plaintiff at the challenged level, and erred only in

not *also* taxing someone else at that level—this Court generally has found a prospective remedy adequate to effectuate the Constitution. And the adequacy of prospective relief is particularly apparent in the Commerce Clause context: because the Clause was not designed to protect individuals, nothing in its policies should move the Court to override the State's decision to withhold monetary relief.

4. Finally, if the Commerce Clause does require retrospective equalization as a remedy, a retroactive increase in the taxes of those benefitted by the discrimination may be a proper form of relief. Retroactive legislation does not, by its nature, violate the Fourteenth Amendment: the Court has made clear that the requirements of due process are satisfied so long as the retroactive law furthers a legitimate state purpose by rational means. In the tax setting, a variety of considerations bears on whether retroactive legislation is constitutional: whether the legislation simply raised the rate of an existing tax; whether the tax was imposed on a profitable transaction rather than a gift; and whether the new tax could have been anticipated. While application of these factors suggests that a retroactive tax on the beneficiaries of Florida's unconstitutional tax preference would satisfy due process requirements, in our view the Court should not now definitively settle the constitutionality of such a tax; if the Court believes retrospective equalization necessary, it would be enough to leave use of a retroactive tax available as an option for the State on remand.

ARGUMENT

Like the American Trucking Associations (“ATA”) petitioners, we believe that the way in which the Court has framed the issues on reargument prompts several preliminary observations. As an initial matter, we note that the Court may dispose of this case—and its companion, *American Trucking Associations, Inc. v. Smith*, No. 88-325 (“ATA”)—without definitively answering the complex question whether the Constitution, of its own

force, ever requires retrospective monetary relief for violations of "clearly established law under the Commerce Clause." Whether or not there are cases in which a constitutional refund requirement may be imposed, respondents' brief on reargument advances compelling equitable reasons against the use of such a remedy here. In *ATA*, meanwhile, respondents have demonstrated that there simply was no violation of "clearly established" Commerce Clause doctrine on the part of the State.

We also note that the Court's first question, which posits a taxpayer that has paid the challenged tax "under protest," presupposes compliance with the procedural and substantive requirements of state law. This is an important presupposition; again, whatever the remedial mandate of federal law in other settings, refunds plainly are not available to taxpayers who fail to comply with state statutes of limitations or rules requiring notice and payment under protest. The *ATA* petitioners frankly acknowledge this point (Br. 6-7),² which was settled by one of the cases upon which both sets of petitioners principally rely. *Ward v. Love County*, 253 U.S. 17, 22, 25 (1920). There is no novelty to this conclusion: the Court has made clear in a variety of settings that preservation of a federal constitutional claim may be conditioned on compliance with nondiscriminatory state procedural rules. See, e.g., *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982); *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

Finally, it is important to bear in mind that the Court's first question on reargument is directed only at cases in which the State has violated "clearly established law under the Commerce Clause." This is a significant and, in our view, sensible limitation on the inquiry. Whether or not the Constitution mandates refunds when the unconstitutionality of the state tax statute was clear at the time of enactment, we demonstrated in our first brief (at 12-16) that compelling reasons of policy make

² All citations to briefs refer to briefs filed on reargument unless otherwise noted.

it inappropriate to use a federal refund remedy against state and local government defendants for the violation of what had been unsettled federal law. See *Lemon v. Kurtzman*, 411 U.S. 192, 207-209 (1973) (plurality opinion) ("*Lemon II*"); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1106-1107 (1983). On reargument, however, both sets of petitioners have simply ignored this limitation on the question posed by the Court, arguing gamely, as they did in their first round of briefs, that the availability of a refund under the Commerce Clause is controlled by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). As in their first briefs, however, petitioners offer absolutely no reason to believe that use of the *Chevron* retroactivity test is constitutionally compelled; neither set of petitioners has cited a single decision of this Court mandating the use of *Chevron* by state courts adjudicating state causes of action, and we are aware of none. In fact, as we explain in our first brief (at 11-12), *Chevron*—a case involving the rules to be applied in federal courts judging federal causes of action—is inapposite here. We therefore turn to the first question actually posed by the Court: whether a State must provide retrospective monetary relief to a taxpayer who pays a tax that is found to violate clearly established law under the Commerce Clause.

I. THE CONSTITUTION DOES NOT REQUIRE A STATE TO PAY RETROSPECTIVE MONETARY RELIEF WHEN STATE TAX STATUTES ARE HELD UNCONSTITUTIONAL

A. The Constitution Does Not, Of Its Own Force, Make Monetary Relief Available Against States.

1. As we demonstrated in our first brief (at 6-7), the Constitution does not, as a general matter, require the use either of retroactivity or of particular refund remedies for violations of federal constitutional or statutory law. Perhaps the Court's most oft-quoted statement on the point is its declaration that "the federal Constitution has no voice upon the subject of retrospectivity" (*United States v. Johnson*, 457 U.S. 537, 542 (1982),

quoting *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)); the Court has applied this understanding in a wide range of constitutional and statutory settings,³ including those in which plaintiffs sought monetary relief.⁴ Petitioners do not, and could not, take issue with these observations.

Indeed, while it may be that full compensation would be available for every wrong "[i]n the best of all possible worlds" (*Parratt v. Taylor*, 451 U.S. 527, 531 (1981)), the Constitution never has been understood to guarantee monetary relief as a remedy for all constitutional violations. From its inception, our system has recognized sovereign and official immunities that may make it impossible for injured parties to obtain money damages. The United States and (as we explain below) the individual States always have been permitted to assert sovereign immunity—a doctrine that has constitutional stature—as a defense to claims for retrospective monetary relief, whether or not those claims are grounded on the Constitution. See generally *United States v. Mitchell*, 445 U.S. 535 (1980); *Sherwood v. United States*, 312 U.S. 584 (1941). And this Court itself has created the extensive series of official immunities that sometimes bar the award of money damages against government officials for constitutional violations. See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978). See also *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367, 372-373 & n.9 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

³ See, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976); *Lemon v. Kurtzman*, 411 U.S. 192, 198-199 (1973) ("Lemon II"); *Connor v. Williams*, 404 U.S. 549, 550-551 (1972); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969).

⁴ See, e.g., *Florida v. Long*, 108 S.Ct. 2354 (1988); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983).

2. Against this background, petitioners make the surprising and peculiar argument that there is a special constitutional right to the refund of state taxes that were collected in violation of the Constitution or federal law. McKesson Br. 8-14; ATA Br. 8-11. Petitioners leave unclear the source of this right; petitioner McKesson refers generally to "equitable remedial principles" (Br. 13), while petitioner ATA advances a general "federal right to retrospective relief." Br. 9. Petitioners nevertheless cite what ATA describes as "a long line of this Court's decisions" that assertedly "require[] disgorgement of taxes exacted in violation of the Constitution." Br. 8. In fact, however, ATA's "long line" of cases began in 1912 and ended in 1939, neatly transecting the *Lochner* era. And on examination, virtually none of the cited decisions even arguably stands for the proposition that the Constitution requires the refund of illegal taxes.⁵

⁵ The following are the decisions cited by McKesson, ATA, or both: *Atchison, T. & S.F.R.R. v. O'Connor*, 223 U.S. 280, 287 (1912), was a refund action brought in federal court; the Court noted that the State permitted actions for taxes mistakenly paid and "presume[d] that a judgment [of unconstitutionality] in the present action would satisfy the [state] law." The language from the opinion quoted by petitioner McKesson (Br. 9) was addressed, not to the general availability of refunds, but to the question whether the taxpayer should be deemed to have paid under protest. See 223 U.S. at 285. *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928), while referring to a "legal right" to a refund (*id.* at 504), leaves entirely unclear whether the Court had in mind a state or a federal right, and certainly does not locate the source of any such federal right; in any event, the Court left open the possibility that discrimination may be cured by prospectively raising tax rates of the favored class. *Id.* at 505. The decision in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), also a refund action, similarly leaves unclear whether the Court had in mind federal or state refund rights, notes that discrimination may be cured by the collection of "additional taxes from the favored competitors," and stands principally for the proposition that a taxpayer who has suffered discrimination cannot, as his only remedy, "be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." *Id.* at 247. In *Jackson County Board v. United States*, 308 U.S. 343, 352 (1939),

In our view, the only two decisions cited that offer petitioners even cold comfort are *Ward v. Love County*, *supra*, and *Carpenter v. Shaw*, 280 U.S. 363 (1930). Both decisions contain language suggesting that a refusal to refund taxes collected in violation of federal statutory law denies the taxpayer due process under the Fourteenth Amendment. *Ward*, 253 U.S. at 24; *Carpenter*, 280 U.S. at 369. There is considerable doubt, however, that *Ward* and *Carpenter* were in fact grounded on the federal Constitution.⁶ And as we explained in our first brief

the county's liability for back taxes was not contested; the only issue before the Court was the availability of interest on those back taxes—and the Court, stating that persons asserting federal rights “are not to have a privileged position over other aggrieved taxpayers in their relation with the states or their political subdivisions,” held interest *unavailable*. And *District of Columbia v. Thompson*, 281 U.S. 25, 31-32 (1930), was an action brought in federal court; the Court held that a federal common-law right of action was available under a quasi-contract theory when the District failed to provide benefits for which it had levied an assessment.

Petitioner McKesson cites two additional cases. *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 109 S.Ct. 633 (1989), makes no reference to the availability of refunds; citing *Iowa-Des Moines*, the Court held only that a taxpayer whose property was overassessed “may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised.” *Id.* at 639. *Maryland v. Louisiana*, 452 U.S. 456 (1981), was an original action in this Court brought by several States and the United States, and plainly has no applicability beyond that setting.

⁶ Petitioner ATA asserts (Br. 15-16 n.7) that commentators have read *Ward* for the proposition that the Constitution requires the refund of taxes collected in violation of federal law. In fact, however, Professor Field—whose article is cited by petitioners for this point (*ibid.*)—explains that Justice Van Devanter’s opinion for the Court in *Ward* “did not squarely base its holding on the United States Constitution.” Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883, 972-973 n.394 (1986). Noting that the opinion discussed state law (see 253 U.S. at 24), Professor Field described “[t]his intermix of state and federal elements and the confusion whether the Court was interpreting state or federal law.” Field, *supra*, 99 Harv. L. Rev. at 972-973 n.394. Professor Field herself explains *Ward* in modern terms as resting on the “federal ability to reject the ‘aberrant state rule.’” *Ibid.* For its part, *Carpenter* simply relied on *Ward*. See 280 U.S. at 369.

(at 8), those doubts are confirmed by decisions rendered both before and after *Ward* indicating that States may assert their sovereign immunity to preclude federal constitutional claims for money damages in state court. See *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929); *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911); *Cunningham v. Mason & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1880); *Beers v. Arkansas*, 61 U.S. (20 How.) 528, 529 (1858).

Moreover, if *Ward* and *Carpenter* were meant to rest on the Fourteenth Amendment, their understanding of substantive due process has not stood the test of time.⁷ Since deciding *Carpenter*, this Court has not cited either decision for the proposition that the Fourteenth Amendment compels States to refund illegally collected taxes.⁸ To the contrary, as we noted in our first brief (at 8-9) (and as petitioners do not deny), this Court in recent years expressly has left it to the state courts to determine the availability of a refund after invalidating a state tax under the Supremacy Clause—the very constitutional violation at issue in *Carpenter*. *E.g.*, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-197 (1983). In other decisions, the Court simply has remanded cases to the state courts so that they might determine the availability of refunds for unconstitutional taxes, often on the seeming assumption that the answer to that question

⁷ We note that *Ward*’s substantive holding—that Congress was not empowered to repeal a tax exemption because doing so would disturb vested property rights—is also of questionable vitality. See, *e.g.*, *Flemming v. Nestor*, 363 U.S. 603 (1960).

⁸ The ATA petitioners were able to find two lower court decisions citing *Ward*. Br. 8-9. Whatever the validity of these decisions on their own terms, they are not relevant here. In one case (*United States v. State Tax Comm’n*, 645 F.2d 4, 5 (5th Cir.), cert. denied, 454 U.S. 896 (1981)) the plaintiff was the United States, and in the other (*Gallagher v. Evans*, 536 F.2d 899, 900-901 (10th Cir. 1976)) the defendant was not a State. As a result, neither case presented Eleventh Amendment or sovereign immunity issues.

turned on state, rather than federal, law. See, e.g., *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 895-896 (1989) (plurality opinion)⁹; *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-277 (1984).¹⁰

The other authority advanced by petitioner ATA in support of the asserted federal right to retrospective monetary relief is plainly inapposite. *Owen v. City of Independence*, 445 U.S. 622 (1980) (cited at Br. 9-10), as we explained in our first brief (at 13), involved the construction of 42 U.S.C. § 1983, and therefore turned on Congress's intent in enacting a particular federal statute;

⁹ In *Texas Monthly*, which involved a secular publication's First Amendment challenge to a tax exemption granted religious entities, the State argued that the taxpayer lacked standing because, if it prevailed on its constitutional claim, the exemption simply would be invalidated. Relying on *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), the Court rejected the State's argument as a matter of standing law, explaining that the availability of a refund was a disputed question of state law that would remain at issue after the decision of the federal constitutional question. But the Court noted that, if the State's reading of its own law was correct, the taxpayer "cannot obtain a refund of the tax it paid under protest," and added that "[i]t is not for [the Court] to decide whether the correct response as a matter of state law to a finding that a state tax is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether." 109 S.Ct. at 895-896 (plurality opinion).

¹⁰ The ATA petitioners argue (Br. 11) that the Court in *Bacchus* recognized the requirement that some form of retrospective relief be made available. But the footnote they cite for this proposition, like the portion of *Texas Monthly* discussed above (see note 9, *supra*), simply rejected a state challenge to the taxpayer's standing. 468 U.S. at 267-268 n.7. The Court in *Bacchus* separately and expressly addressed the question whether "if the tax was illegally discriminatory the Commerce Clause requires that the taxes collected be refunded"; the Court declined to resolve this "issue[] of remedy," remanding the case to the state courts for that purpose. *Id.* at 277.

the decision says nothing about what the Constitution demands of state courts in state causes of action. The decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (cited at Br. 10), expressly turned on the language and uniquely self-executing nature of the Just Compensation Clause, which secures a right to "compensation in the event of * * * a taking" (*id.* at 315) (emphasis in original) and may overcome even the sovereign immunity of the United States. Cf. *Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5 (1986). Indeed, the presence of such language in the Fifth Amendment—and in that Amendment alone—suggests that the other provisions of the Constitution were *not* designed to make monetary relief available of their own force.¹¹

B. The Availability Of Monetary Relief Against A State In A State Cause Of Action In State Court Is A Matter Of State Law.

With this underbrush cleared away, we are in a position directly to address the Court's first question. We note that this question—which postulates a violation of clearly established law—hypothesizes the hardest case for the State. But having said that, our answer is that there is no *federal* right to a refund of unconstitutional taxes even in the circumstances posed by the Court. Instead, as we argued in our first brief (at 16-25), the scope of the monetary remedy available in state court on a state cause of action against the State is a matter of state law.

While the ground advanced by petitioner McKesson in seeking a refund was the inconsistency of the challenged tax with the Commerce Clause, McKesson's cause of action did not spring full-blown from the federal Constitution. Instead, the petitioners both in this case and in *ATA* proceeded in state court under state causes of ac-

¹¹ Although the ATA petitioners attempt to draw support from the Just Compensation Clause (Br. 24), neither set of petitioners has argued to this Court that the challenged taxes actually amounted to "takings" in the constitutional sense.

tion. As petitioners concede (ATA Br. 6-7), plaintiffs in state court are bound by state procedural rules (such as exhaustion of remedies requirements) and by at least some substantive limitations on the availability of relief (such as statutes of limitations), the interpretation of which surely are matters of state law. In our view, the other procedural and remedial rules that govern the conduct of such lawsuits, including the rules concerning retrospectivity, must similarly be matters of state law. This conclusion certainly is suggested by the Court's repeated decisions leaving it to the States to formulate remedies for the collection of unconstitutional taxes. But more than that, in our view the use of state remedial rules in a state court lawsuit for money damages against a State is compelled by the nature of state sovereign immunity.

1. At the outset, we think it plain that States may assert their sovereign immunity in their own courts against claims for money damages that are advanced in state-created causes of action, even if the claims are grounded on the federal Constitution. Since the foundation of the Union, it has been "an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without consent." *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2310 (1989), quoting *Beers*, 61 U.S. (20 How.) at 529. See *Nevada v. Hall*, 440 U.S. 410, 420 (1979); *id.* at 431 (Blackmun, J., dissenting). While the specific question whether that immunity applies to federal claims advanced against the States in state court has been infrequently litigated, on those occasions when the Court has reached the issue it consistently has indicated that "without [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever." *Hopkins*, 221 U.S. at 642. See cases cited at page 9, *supra*. Indeed, while the amenability of States to suit in federal court under Article III was debated extensively at the time of the Constitution's ratification (see *Welch v. Texas Dept. of Highways & Public Transportation*, 483 U.S. 468, 480-484

(1987) (plurality opinion); *id.* at 504-507, 511-513 (Brennan, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 263-280 (1985) (Brennan, J., dissenting)), we are aware of no suggestion during those debates that state courts were obligated by the Constitution to entertain claims against States for money damages. See generally *ibid.* And that is hardly surprising: it was and is a fundamental tenet of sovereign immunity that, wherever else it may be hauled into court, "no sovereign may be sued in its own courts without its consent." *Hall*, 440 U.S. at 416.

This view is confirmed by the modern understanding of the Eleventh Amendment, which of course bars federal courts from entertaining claims for money damages against the States (including claims for the refund of unconstitutional taxes). See *Kennecott Copper Co. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944). See generally *Papasan v. Allain*, 478 U.S. 265, 278 (1986); *Edelman v. Jordan*, 415 U.S. 651, 668-669 (1974). While the Court has debated the meaning of the Amendment at length in recent years, it is clear that at least five Justices now accept the rule of *Hans v. Louisiana*, 134 U.S. 1 (1890), which rests on the proposition that suits against unconsenting States were "unknown to the law" at the time of the Constitution's ratification (*id.* at 15). These Justices thus recognize that the Eleventh Amendment applied to Article III of the Constitution (and to the federal courts) "the fundamental principle of sovereign immunity" that prevailed at that time. *Welch*, 483 U.S. at 472 (plurality opinion), quoting *Pennhurst State School & Hospital v. Halderman*, 473 U.S. 89, 98 (1984). See *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Atascadero*, 473 U.S. at 238.¹²

¹² See *Dellmuth v. Muth*, 109 S.Ct. 2397, 2401 n.2 (1989) (declining to overrule *Hans*); *Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273, 2295 n.8 (1989) (opinion of White, J.) (stating that *Hans* should not be overruled); *id.* at 2298-2299 (opinion of Scalia, J.)

This view of state sovereign immunity is fully consistent with the Court's most recent Eleventh Amendment decision, *Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273 (1989), in which a splintered Court held that Congress may override the States' Eleventh Amendment immunity when exercising its power under the Commerce Clause. The plurality reasoned that, "in approving the commerce power, the States consented to suits against them based on congressionally created causes of action." 109 S.Ct. at 2285 (plurality opinion). But as this language itself indicates, the four Justices in the plurality accepted the existence of state sovereign immunity even in *federal court* in the absence of congressional action. See, e.g., *id.* at 2284 (emphasis added) ("Congress has the authority to *override States' immunity* when legislating pursuant to the Commerce Clause"). The four Justices in dissent, meanwhile, read the Eleventh Amendment as reflecting "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted." *Id.* at 2297 (opinion of Scalia, J.). Needless to say, neither these opinions, nor Justice White's separate opinion, suggested that state courts need entertain actions against States that cannot be brought in federal court.¹³

(stating that *Hans* should not be overruled). Justice White joined the plurality opinion in *Welch*, while the Chief Justice and Justices O'Connor, Scalia, and Kennedy seemingly have endorsed that opinion. See *Union Gas*, 109 S.Ct. at 2297-2298 (opinion of Scalia, J.). The *Welch* plurality opinion therefore appears to express the views of a majority of the Court.

¹³ Citing *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908), the ATA petitioners suggest (Br. 13) that a State may not assert its sovereign immunity in its own courts against federal constitutional claims. But *Crain*—which predated many of the cases we cite above—is slender authority for such a profound proposition, "for more reasons than just the age and moderate obscurity of the case." Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1095-1096 (1983). *Crain* was an action brought in state

By ratifying the Constitution, the States thus did not consent (in the absence of congressional action) to the assertion against them of constitutional claims in federal court. This being so, it is difficult to imagine why, by the same ratification, they should be understood to have taken the unlikelier step of irrevocably waiving the fundamental protection of sovereign immunity against constitutional claims in their own courts. That the States did not take such a step has been the clear understanding of the Court, which has emphasized that States *may* supplement whatever remedies for constitutional violations are available in federal court by "waiving their immunity from suit in state court on state-law claims." *Welch*, 483 U.S. at 488 (plurality opinion) (footnote omitted). See *Will*, 109 S.Ct. at 2320 (Brennan, J., dissenting). And this conclusion is only logical. The United States, after all, is bound by the Constitution to the same extent as are the States, yet it is not amenable to suit on constitutional claims in its own courts absent a waiver of im-

court against a state official seeking injunctive relief for an asserted violation of the Commerce Clause. This Court rejected the State's argument that its courts lacked jurisdiction to hear the claim, reasoning that the Eleventh Amendment would make injunctive relief unavailable in federal court and that there must be some means of enforcing the Constitution in some court. 209 U.S. at 226-227. Because the Court went on to reject the Commerce Clause claim on the merits, the jurisdictional issue might not have been carefully analyzed. In any event, the suit was not one for monetary relief. And the proposition upon which the Court grounded its jurisdictional discussion—that the Eleventh Amendment would bar a federal court from entertaining a claim against a state official for prospective relief—plainly no longer is valid (even if it was at the time *Crain* was decided). Indeed, Justice Harlan concurred separately, maintaining that the existence of jurisdiction "certainly is a state, not a federal question. Surely, [the State] has the right to say of what class of suit its own courts may take cognizance." *Id.* at 233 (Harlan, J., concurring). Not surprisingly, "[n]o modern case has held that state courts have an obligation to hear claims barred from the federal courts by the eleventh amendment." Fletcher, *supra*, 35 Stan. L. Rev. at 1096. The only decision other than *Crain* cited by petitioners, *Private Truck Council v. New Hampshire*, 517 A.2d 1150, 1156 (N.H. 1986), involved a state court's interpretation of its own common law.

munity. Cf. *Union Gas*, 109 S.Ct. at 2298 (opinion of Scalia, J.).

2. Petitioners contend (McKesson Br. 7; ATA Br. 14-15) that, if a State chose not to create a cause of action to remedy the collection of unconstitutional taxes, a federal remedy would be available directly under the Commerce Clause on the theory of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); the ATA petitioners blithely go on to assert that “[w]hether a taxpayer seeks prospective or retrospective relief for a Commerce Clause violation, the cause of action is precisely the same.” Br. 14-15. This contention plainly is incorrect: for sovereign immunity (and Eleventh Amendment) purposes, the distinction between prospective injunctive and retrospective monetary relief is fundamental. Whether or not a *Bivens* action is available in federal court against state officials for prospective relief under the Commerce Clause, the Eleventh Amendment—a textual limitation on suit in federal court that trumps the *Bivens* remedy—would bar a federal court from awarding money damages.¹⁴ The availability of an action in state court under a *Bivens* theory, meanwhile, is a matter of state law, and state sovereign immunity rules would be fully applicable in such an action.¹⁵

¹⁴ The ATA petitioners may mean only that the *Bivens* “cause of action” is available in some theoretical sense, even though monetary relief could not be granted under that cause of action. See ATA Br. 12, citing *Davis v. Passman*, 442 U.S. 228 (1979). Cf. *United States v. Stanley*, 483 U.S. 669, 684-685 (1987). But whether the Eleventh Amendment is viewed as a jurisdictional bar or a limitation on remedy, the outcome is the same: money damages against a State are not available under a *Bivens* theory.

¹⁵ The Court has explained that it is “[t]he federal courts’ statutory jurisdiction to decide federal questions” under 28 U.S.C. § 1331 that “confers adequate power to award damages to the victim of a constitutional violation” on a *Bivens* theory. *Bush v. Lucas*, 462 U.S. 367, 378 (1983). See *id.* at 374; *Bivens*, 403 U.S. at 395-396; *Bell v. Hood*, 327 U.S. 678, 684 (1946). Whether the state statutes creating the jurisdiction of state courts confer similar power on those courts is a matter for the States.

3. Rather than argue that the States cannot assert their sovereign immunity against Commerce Clause claims, petitioners principally contend that, because Florida permits refund actions in state court, it *has not* asserted its immunity here. McKesson Br. 7; ATA Br. 13. Considerations of sovereign immunity, however, fundamentally bear on the question whether the availability of particular forms of relief is a matter of federal or of state law. We ground this conclusion on several propositions.

First, the interpretation of state law is conclusively committed to the state courts, whose determinations may not be reviewed by this Court. At least where the state law is procedural in nature, a state court’s decision based on that law is unreviewable in this Court, even if application of the state law prevents the effectuation of a federal right. See, e.g., *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). As we have noted, petitioners acknowledge that this principle may be applied in the tax refund setting to rules mandating payment under protest or exhaustion of administrative remedies; the interpretation of these requirements plainly is a matter of state law.

Second, petitioners themselves recognize that some state law substantive limitations on the scope of relief, such as statutes of limitations—which in Florida’s case makes it impossible to remedy constitutional violations that occurred more than three years prior to the accrual of the right to seek a refund (see Fla. Stat. § 215.26(2))—may be applied to limit the availability of tax refunds. Similarly, limitations on the State’s waiver of sovereign immunity (such as a restriction on the availability of relief for competitive injury or on the maximum amount of permissible recovery against the State) may curtail a taxpayer’s ability to obtain a refund on federal grounds; other matters of remedy, such as the availability of interest on refunds, also are aspects of the State’s waiver of sovereign immunity. Cf. *Library of Congress v. Shaw*, 478 U.S. 310 (1986). The meaning

(and applicability in any given case) of these state law restrictions on the availability of relief surely may be settled by state courts according to their own rules. This Court could not, for example, review a state court's holding that the waiver of immunity does not extend to damages for competitive injuries. Cf. Resp. first Br. 20 n.20; *Tranon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 918-919 (Fla. 1985).

Third, in our view the holding below is not an interpretation of the Commerce Clause; fairly read, we think that the decision of the Florida Supreme Court is an application of state remedial rules that preclude the award of retroactive relief when, in light of all the circumstances, retroactivity would be inequitable.¹⁶ And the application of remedial rules relating to retrospectivity, like the other limitations on relief mentioned above, should be a matter of state law to be settled by the state courts. After all, it surely would be anomalous to hold that whether the State has waived immunity is a matter of state law, that the procedures used to adjudicate actions under that waiver are matters of state law, that limits on remedies relating to interest, the period for which relief is available, or permissible amounts of recovery are matters of state law—but that the closely related retrospectivity rules used in such actions are matters of federal law to be created by this Court. In our view, all of these rules, whether codified by the state

¹⁶ The court's analysis of retroactivity made no mention of Commerce Clause policies. Instead, the court discussed equitable considerations—in particular, petitioner McKesson's pass-through of the challenged tax to its customers—and cited one state decision and one decision of this Court (*Lemon II*) for their general retroactivity principles. Pet. App. 21a. We note that the State, in opposing retroactivity before the court below, cited *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), which established the principle that state courts may apply their own retroactivity rules. See No. 70,368 C.A. Br. 29. It therefore does not “fairly appear[] that the state court rested its decision primarily on federal law” (*Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983)); the court below plainly did not believe that this Court's decisions “compel[ed] the result.” *Id.* at 1041.

legislatures or developed incrementally by the state courts as a matter of common law, are elements of the State's waiver of immunity that limit the extent to which monetary relief is available in state causes of action.

Of course, it may well be that, in other settings, States may not rely on substantive state law rules that frustrate the effectuation of federal rights; a State could not, for example, apply a law precluding use of the exclusionary rule in its courts. And as a general matter, it ultimately is for this Court to determine whether particular forms of relief are necessary to remedy violations of the federal Constitution. See *Bush*, 462 U.S. at 374 & n.12. But in the particular context of suits against a sovereign for money damages, the Constitution itself permits the States (and the United States) to determine the scope of available relief. The interpretation of state rules setting these limits are matters of state law to be decided by the state courts. This Court accordingly should not disturb the Florida Supreme Court's application of its normal rules of retroactivity to petitioner McKesson's claim.¹⁷

4. This approach plainly does not render the Commerce Clause unenforceable, as petitioners seem to suggest. See ATA Br. 14. The States have in fact opened their courts to claims for tax refunds grounded on the federal Constitution and, as we noted in our first brief

¹⁷ This Court may, of course, intervene to prevent state courts from distorting state law for the purpose of frustrating federal rights. See, e.g., *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982). But petitioners have made no contention that the court below took such action. Indeed, petitioners themselves cite cases in which the Florida courts awarded refunds on federal claims. McKesson Br. 7; ATA Br. 11-12. We also note that this is not a case in which the State is alleged to have discriminated against federal claims in favor of similar state-law actions, either in the waiver of its immunity or in the application of its remedial rules. Cf. *Will*, 109 S.Ct. at 2320 (Brennan, J., dissenting); *Testa v. Katt*, 330 U.S. 386 (1947). Nor is this a case where the State is attempting to impose limitations on a cause of action created by Congress. Cf. *Felder v. Casey*, 108 S.Ct. 2302 (1988). See generally *Employees v. Missouri Dept. of Public Health & Welfare*, 411 U.S. 279 (1973).

(at 20 & n.13), state courts routinely award monetary relief on these claims. In any event, federal courts stand ready to provide declaratory or injunctive relief to terminate Commerce Clause violations.¹⁸ See *Will*, 109 S.Ct. at 2311 & n.10; *Welch*, 483 U.S. at 488; *Papasan*, 478 U.S. at 276-277. Indeed, in the Eleventh Amendment setting the Court has concluded that the line between prospective and retrospective relief is the appropriate one to use in reconciling competing constitutional concerns, explaining that federal relief is available in

cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."

Papasan, 478 U.S. at 277-278, quoting *Green*, 474 U.S. at 68.

¹⁸ Declaratory relief is available in federal court under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). The question whether Commerce Clause claims are cognizable under 42 U.S.C. § 1983 is now pending before the Court in *Lewis v. Continental Bank Corp.*, No. 87-1955, and it therefore is an open question whether Section 1983 authorizes equitable relief against state officials for violations of the Clause; if it does not, such relief is likely available under a *Bivens* theory. See page 16, *supra*. We note, however, that Congress itself has taken action to foreclose certain avenues of relief against the States. Even if Section 1983 is held applicable to Commerce Clause claims, Congress chose not to make States liable under that statute. *Will*, 109 S.Ct. at 2308-2311; *Quern v. Jordan*, 440 U.S. 332 (1979). And the Tax Injunction Act, 28 U.S.C. § 1341, bars federal courts from enjoining the collection of state taxes.

Finally, and perhaps most significantly, regulation of commerce is textually committed to Congress by the Constitution; Congress may expand or contract limitations on commerce as it sees fit. This Court thus held in *Union Gas* that Congress's Commerce power includes the authority to create actions against the States for money damages. See 109 S.Ct. at 2284-2285 (plurality opinion). The creation of remedies for fundamentally unfair activity on the part of the States, or the sort of frustration of Commerce Clause policies that is hypothesized by petitioners (see ATA Br. 19-20), is therefore appropriately left to congressional action.

C. This Court Should Not Create A General Right To Refunds Of Taxes Collected In Violation Of The Commerce Clause.

Even if we are wrong in concluding that the availability of money damages in a state court action against a State *necessarily* is a matter of state law, the Court need not create and apply its own retrospectivity rules. As we noted in our first brief (at 16-19), questions of remedy that arise in state causes of action typically are resolved by state courts under their own rules. There is, moreover, nothing novel in the idea that state rules should govern the availability of remedies even in cases involving the effectuation of federal constitutional rights. See, e.g., *Owens v. Okure*, 109 S.Ct. 573 (1989); *Wilson v. Garcia*, 471 U.S. 261 (1985). Because there is no constitutional imperative requiring the use of a uniquely federal remedy here, we believe that it would be appropriate for the Court generally to allow the States to apply their own refund rules in cases involving the Commerce Clause.

1. As a preliminary matter, compelling prudential concerns militate against this Court's creation of a damages remedy against the States. Even if the enactment of state refund statutes means that sovereign immunity is not squarely applicable here, the policies that underlie the doctrine retain constitutional stature; in a case where

the state courts find money damages unavailable, those policies should make any federal court, including this one, reluctant to take the unprecedented step of creating a monetary remedy against a State. That is particularly so when *Congress* chose not to make States liable for money damages in enacting the principal vehicle for the enforcement of federal constitutional rights, 42 U.S.C. § 1983. See *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989). Moreover, the nature of the federal system does not require judicial creation of a monetary remedy: as the Court has recognized, "the availability of prospective relief of the sort awarded in *Ex Parte Young* [, 209 U.S. 123 (1908),]" suffices to "give[] life to the Supremacy Clause." *Green*, 474 U.S. at 68. At the same time, institutional considerations suggest that the Court should hesitate before constitutionalizing the rules governing money damages—a course that would require the Court to assess the validity of every state retroactivity and remedial rule,¹⁹ and that would transform every denial of a federally based claim for a tax refund into a constitutional case that could be brought to this Court.

The peculiarity of such an approach is visible here. The ATA petitioners evidently recognize that, whatever law applies, a tax refund should be unavailable when there has been no actual discrimination or duplicative taxation (see Br. 27), or where the taxpayer has succeeded in passing a discriminatory tax on to its customers (see Br. 25). Petitioners also seemingly recognize that equitable considerations would bar a refund when a retrospective remedy would impose an undue burden on the State. ATA Br. 22 ("the issue of refund relief will not even arise unless the financial burden argument already has been found wanting"). Yet those are precisely the considerations on which the court below relied in denying a refund. Pet. App. 21a. Petitioners, in acknowledging the validity of these factors, are essentially asking this Court to do nothing

¹⁹ As we noted in our first brief (at 17 n.11), such rules naturally differ from State to State.

ing more than review the state court's fact-bound and discretionary conclusions on these points.

2. Nothing in the Commerce Clause requires this Court to accept petitioners' novel invitation. As we explained in our first brief (at 17-18, 24-25), when a constitutional challenge involves a denial of equal treatment—that is, when the State had authority to impose the challenged tax on the plaintiff at the challenged level, and erred in not *also* taxing someone else at that level—this Court generally has found a prospective remedy adequate to effectuate the Constitution. Thus, in equal protection and related challenges involving a range of state activities, from taxation to the award of benefits to the adjustment of private rights, the Court has left it to state courts to determine whether constitutional defects should be remedied by expanding or contracting the pool of beneficiaries. See *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. at 895-896 (plurality opinion); *Hooper*, 472 U.S. at 624; *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982); *Wengler v. Drug- gists Mutual Insurance Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268, 272 (1979); *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975). See also *Williams v. Vermont*, 472 U.S. 12, 28 (1985); *Exxon Corp.*, 462 U.S. at 196-197. Cf. *Heckler v. Mathews*, 465 U.S. 728, 739, 740 n.8 (1984); *Califano v. Westcott*, 443 U.S. 76, 93-95 (1979) (opinion of Powell, J.).

The ATA petitioners maintain that these decisions leave to the States only the ability to fashion appropriate prospective relief, and that "nothing in them rules out the potential need for retrospective relief." Br. 10 n.5.²⁰

²⁰ In arguing that prospectivity is not adequate, the ATA petitioners suggest that refunds surely would be in order to remedy a hypothetical tax that discriminates on the basis of race or gender. Br. 10-11 n.5. But one can accept petitioner's proposition without abandoning the Court's conclusion that prospectivity generally offers adequate relief. If the Court in fact has discretion to formulate refund remedies as a matter of federal law, it plainly may exercise equitable discretion in doing so; the judgment that prospective relief usually "gives life to the Supremacy Clause" (*Green*,

Yet the Court has made clear that “the government could deprive a successful plaintiff of *any monetary relief* by withdrawing the statute’s benefits from both the favored and the excluded class.” *Mathews*, 465 U.S. at 739 (emphasis added) (footnote omitted). If States (or the Federal Government) that follow this course nevertheless generally are required to take the extraordinary additional step of retroactively reclaiming the benefits paid to the favored group, it is surprising that the Court never has so much as hinted at such an obligation.²¹

3. The adequacy of prospective relief is particularly apparent in the Commerce Clause setting. Because the Clause was not designed for the benefit of individuals, nothing in its policies should move the Court to override the State’s decision to withhold monetary relief. Indeed, the Court expressly has contrasted the purposes served by the Commerce and Equal Protection Clauses in this regard, noting that they “perform different functions in

474 U.S. at 68) might be overcome in the grotesque circumstances imagined by petitioners.

²¹ In fact, there is reason to believe that the Court did not have such an understanding of the States’ obligations. States often have challenged the plaintiffs’ standing in refund suits, arguing that the remedy for unconstitutionally disparate treatment under state law would be elimination of the tax exemption for the favored class, and that success on the constitutional challenge accordingly would bring the plaintiff no relief. If there were an absolute right to retrospective equality, as petitioners here maintain, the existence of that right would answer the States’ standing arguments; the meaning of state law would be irrelevant. But the Court has given a different answer. It has reasoned that the appropriate remedy for an underinclusiveness challenge is a matter of state law to be decided by the state courts on remand—and that the possibility of a favorable ruling on state law after remand keeps the case live pending resolution of the federal constitutional challenge. See *Texas Monthly*, 109 S.Ct. at 896 (plurality opinion), citing *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221 (1987); *Arkansas Writers’ Project*, 481 U.S. at 227, citing *Orr*, 440 U.S. at 273. There would have been no need for the Court to engage in this reasoning had it believed that the Constitution requires retrospectivity as a remedy.

the analysis of the permissible scope of a State’s power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States.” *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985) (footnote omitted). We argue this point at length in our first brief (at 21-23), and in our brief in *Lewis v. Continental Bank Corp.*, No. 87-1955, now pending before the Court; we therefore do not repeat our discussion of the issue here. The deterrence and equitable arguments advanced by ATA (Br. 18-24) also are addressed adequately in our first brief (at 12-16).

One of the ATA petitioners’ comments on the nature of the Commerce Clause, however, does demand an additional response. The availability of declaratory and injunctive relief against Commerce Clause violations, petitioners assert, “is a complete answer to the contention that affirmative relief may never be awarded at the instance of those victimized by such violations.” Br. 17. The ATA petitioners plainly are correct, of course, in stating that they have suffered injury in fact sufficient to confer standing, and that they may seek equitable relief to enforce the Clause. That proposition, however, does not establish either that the Commerce Clause was specifically designed to benefit persons in their position or that the policies of the Clause require monetary compensation as a remedy.

In fact, a plaintiff may maintain an action to enforce a statutory or constitutional provision of which he was not an intended beneficiary. The Court has made clear, for example, that a plaintiff may satisfy even the so-called “zone of interests” prudential limitation on standing, at least in a statutory action under the Administrative Procedure Act, 5 U.S.C. § 702, when there is “no indication of congressional purpose to benefit the would-be plaintiff.” *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 399-401 & n.16 (1987).²² For present purposes, however,

²² This principle explains the decision in *Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500 (1989), cited by ATA at Br. 17 n.8. We note that nothing in *Davis* suggests that taxpayers injured by

the important question *does* concern the purposes of the Clause; and, as we explain in our first brief, the Clause was designed to serve national rather than individual ends.

II. THE DUE PROCESS CLAUSE DOES NOT PRECLUDE A STATE FROM REMEDYING THE EFFECTS OF A DISCRIMINATORY TAX BY RETROACTIVELY RAISING THE TAXES OF PERSONS WHO BENEFITTED FROM THE DISCRIMINATION.

1. If the Commerce Clause does require retrospective equalization, the answer to the Court's second question is plain: in at least some circumstances, a retrospective increase in the taxes of those benefitted by the discrimination is a proper form of relief. At the outset, such an increase surely would suffice to cure the Commerce Clause violation. As the Court has made clear in the equal protection context, persons in petitioners' circumstances (who do not deny the State's power to tax them but argue that the tax levels unconstitutionally favored another category of taxpayer) are entitled only to "equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Mathews*, 465 U.S. at 740. If this requirement of equal treatment extends into the past, a State may satisfy it by imposing a retroactive burden on the favored class, granting offsetting prospective benefits to the disfavored class, or by any combination of the two. Petitioners do not dispute this point. See McKesson Br. 25; ATA Br. 7.

It also is clear that retroactive tax increases do not, by their nature, deny due process to the persons whose taxes are increased. The Court's "'cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.

a violation of intergovernmental immunity doctrine are entitled to refunds as a matter of federal law; because the State conceded the availability of a refund, the issue was not before the Court in that case. *Id.* at 1508.

* * * This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.'" *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728-730 (1984), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). The Court thus held that retrospective legislation satisfies the requirements of due process "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." *R.A. Gray*, 467 U.S. at 729. See *id.* at 730; *Turner Elkhorn Mining*, 428 U.S. at 18. In the tax setting in particular, "[l]iability for taxes under retroactive legislation has been 'one of the notorious incidents of social life'" (*Untermeyer v. Anderson*, 276 U.S. 440, 450 (1928) (Brandeis, J., dissenting) (citation omitted)); the Court therefore consistently has upheld retroactive taxes unless they are "so harsh and oppressive as to transgress the constitutional limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1938). See *United States v. Hemme*, 476 U.S. 558, 568-569 (1986).²³ Applying this principle, this and other federal courts repeatedly have upheld retroactive tax legislation,²⁴ as petitioner McKesson recognizes. See Br. 19-24.

²³ We do not understand the Court to have created a separate test for the subset of retroactivity cases involving taxation. Thus the decision in *R.A. Gray* relied for the formulation of its rule on the Court's holdings in *Welch v. Henry*, *supra*, and *United States v. Darusmont*, 449 U.S. 292 (1981), decisions involving retroactive taxation. See 467 U.S. at 730, 731. See also *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.3 (1977).

²⁴ See, e.g., *United States v. Darusmont*, *supra*; *Welch v. Henry*, *supra*; *United States v. Hudson*, 299 U.S. 498, 499 (1937); *Reinecke v. Smith*, 289 U.S. 172, 175 (1933); *Milliken v. United States*, 283 U.S. 15, 23 (1931); *Cooper v. United States*, 280 U.S. 409, 411 (1930); *Lynch v. Hornsby*, 247 U.S. 339 (1918); *Brushaber v. Union Pacific R.*, 240 U.S. 1, 20 (1916); *Stockdale v. The Insurance Cos.*, 87 U.S. (20 Wall.) 323, 331 (1873); *DeMartino v. Commissioner*, 862 F.2d 400, 408 (2d Cir. 1988); *New England Baptist Hospital v. United States*, 807 F.2d 280, 284-285 (1st Cir. 1986); *Estate of Ekins v. Commissioner*, 797 F.2d 481, 484-485 (7th Cir. 1986); *Fein v. United States*, 730 F.2d 1211, 1213 (8th Cir.), cert.

Against this background, a retroactive tax on the beneficiaries of Florida's unconstitutional tax preference would appear to satisfy the requirements of due process. It would be the most precisely targeted and effective method of curing unconstitutional state action—and thus surely would be a rational way of furthering a legitimate state purpose. See *Turner Elkhorn*, 428 U.S. at 42 (opinion of Powell, J.). Retroactivity would not unfairly involve the imposition of an entirely new and unanticipated form of taxation; all wine and liquor sales in Florida were subject to some sort of tax, while the validity of the tax preferences was the subject of ongoing litigation from their inception. See *United States v. Darusmont*, 449 U.S. 292, 298-300 (1981). The retroactive levy would be imposed, not on a gratuitous action such as the conveyance of a gift (which a taxpayer might have avoided had he anticipated taxation), but on a commercial transaction that presumably would remain profitable even if subject to a reasonable tax. See *Welch*, 305 U.S. at 148; *United States v. Hudson*, 299 U.S. 498, 500 (1937). And the tax need not extend into the distant past since, as petitioner McKesson seems to acknowledge (Br. 28), the requirements of the Commerce Clause would be satisfied by a retroactive increase that goes only to the limits of the statute of limitations for tax refunds.

2. Petitioner McKesson nevertheless offers two arguments against the use of a retroactive tax in this case: that five years is too long a period of retroactivity (Br. 28), and that the State in any event has been insufficiently prompt in implementing a retroactive increase (Br. 26-27). Both arguments misunderstand this Court's decisions. Neither this nor any other federal court ever has imposed an absolute due process time limit on the acceptable period of retroactivity. See *Temple University v.*

denied, 469 U.S. 858 (1984); *Reed v. United States*, 743 F.2d 481, 485 (7th Cir. 1984), cert. denied, 471 U.S. 1134 (1985); *Ward v. United States*, 695 F.2d 1351, 1354 (10th Cir. 1982); *Purvis v. United States*, 501 F.2d 311, 313 (9th Cir. 1974).

United States, 769 F.2d 126, 135 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986). Indeed, in the setting of so-called "corrective taxes," in which the legislature retroactively authorizes taxes that were illegal when collected, the Court has approved retroactive legislation reaching back more than 10 years. See, e.g., *Van Emmerik v. Janklow*, 304 N.W.2d 700 (S.D. 1981), appeal dismissed for want of a substantial federal question, 454 U.S. 1131 (1982).²⁵

In arguing that Florida did not promptly enact corrective legislation, petitioner McKesson seemingly contends that the State should have imposed a retroactive tax during the course of this litigation. See Br. 24, 25. In petitioner's view, a State must enact such a tax at the time that its taxing scheme is challenged, or forever lose its right to pass corrective legislation; if the tax scheme ultimately is held to be constitutional, petitioner asserts, "the state may, if it chooses, retroactively restore the permissible preference." Br. 25. In our view, this juggling of tax liability would be an uncommonly silly method of adjusting tax burdens, and its use is not constitutionally compelled. When the unconstitutionality of a State's statute and its liability for retroactive relief are settled, it is time enough for the State (through its courts or legislature) to determine an appropriate remedy. That is made clear by this Court's repeated practice (in the cases cited above, at 23) of remanding cases to the state courts for a determination of remedy after a constitutional challenge is finally resolved.

²⁵ Petitioner McKesson contends that *Welch v. Henry* recognized two years as the limit of permissible retroactivity. In fact, the language quoted by petitioner for this proposition (Br. 28-29) was taken from the opinion of the state court in that case. In full, this Court's observation was that, "[w]hile the Supreme Court of Wisconsin, [223 Wis. 319, 217 N.W. 68, 72] thought that the present tax [which reached back two years] might 'approach or reach the limit of permissible retroactivity', we cannot say that it exceeds it." 305 U.S. at 151. This Court itself expressed no view on the outer bounds of acceptable retroactive legislation.

3. Having said that, in our view it would be inappropriate (or impossible) for the Court now to settle definitively the constitutionality of a retroactive tax on the beneficiaries of Florida's unconstitutional preferences. "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid" (*Welch*, 305 U.S. at 147); doing so here would require an examination of the operation of the tax, its incidence (whether on retailers, distributors, or wholesalers), and other details that must be matters of speculation. Moreover, whatever constitutional defects might lie in a retroactive tax involve its impact on the past beneficiaries of the preferences, not on petitioner McKesson. Those beneficiaries, however, are not parties to this proceeding and are not in a position to assert in this Court whatever rights they may have. We therefore believe that—if the Court finds retrospective equalization constitutionally compelled—it would be enough to leave use of a retroactive tax available as an option for the State on remand.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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September 20, 1989

SEP 20 1989

No. 88-192

JOSEPH E. SPANIEL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MCKESSON CORPORATION,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,*Respondents.*

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF GEORGIA, LOUISIANA, MARYLAND, MICHIGAN,
MISSISSIPPI, NEBRASKA, NEVADA, NEW HAMPSHIRE,
NEW JERSEY, NORTH CAROLINA, OKLAHOMA, OREGON,
SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH,
VERMONT, VIRGIN ISLANDS, VIRGINIA, WISCONSIN, AND
WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENTSMARY SUE TERRY, Attorney General
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QUESTION PRESENTED

Amici curiae will address only the first question set forth in the Court's July 3, 1989 order:

When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

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INTEREST OF AMICI CURIAE

This brief in support of Florida is submitted on behalf of Georgia, Louisiana, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, the Virgin Islands, Virginia, Wisconsin and Wyoming pursuant to Supreme Court Rule 36.4.

In its July 3, 1989 order, the Court asked for additional briefs and argument in *McKesson* on the following issue:¹

When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

109 S. Ct. 3238 (1989).

After argument in *McKesson* on March 22, 1989, the Court decided *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500 (1989). In *Davis*, the Court held that Michigan's taxation of federal retirement benefits, while exempting state and local retirement benefits, violated the constitutional doctrine of intergovernmental tax immunity as embodied in 4 U.S.C. § 111. 109 S.Ct. at 1508.

The effect of the decision in *Davis* was not only to question the validity of the income tax structure in at least twenty-three states but also to raise the issue of under what circumstances states must refund taxes previously paid. This latter issue was not addressed in *Davis* since respondent State of Michigan had conceded that a refund was due if the tax exemption was declared invalid. 109 S.Ct. at 1508-09. Accordingly, there is a potential that states affected by the *Davis* decision could be substantially affected by the decision and rationale in *McKesson*.

Additionally, amici states and other states are from time to time faced with litigation which challenges state taxes on Commerce Clause grounds. Amici states, therefore, have a direct and abiding interest in the refund issue now before this Court on reargument in *McKesson*.

¹ This amici curiae brief will not address the second issue scheduled for reargument in *McKesson* regarding whether a State may remedy the effect of a discriminatory tax by retroactively raising the tax on those who benefitted from the discrimination. 109 S.Ct. 3238 (1989).

SUMMARY OF ARGUMENT

The extent of the potential financial impact on the states which may be affected by *Davis* accentuates the importance of allowing individual state legislatures and courts to determine the issue of when state tax refunds are required. See Appendix A for a list of the states potentially affected by the decision in *Davis*. Each state has provided information on the potential financial impact on that state if it is required to refund for its current statutory refund period the taxes previously paid on federal retirement benefits.²

Should the Court determine that, under the facts presented in *McKesson*, federal law requires refunds, amici curiae respectfully submit that the Court should narrowly confine this remedy to the *McKesson* facts: the payment under protest of a tax that violates clearly established law under the Commerce Clause.

ARGUMENT

I. Determination of Payment of Refunds Should Be Left to Individual States

Assuming that the decision in *Davis* invalidates the tax structure in approximately twenty-three states, each of these states must decide whether to amend its tax statutes to extend the exemption to federal retirees or to repeal the exemption for state and local retirees.³ This Court appropriately recognized in *Davis* that this decision should be left to the state legislatures and state courts and not to the federal courts. The Court stated:

In this case, appellant's claim could be resolved either by extending the tax exemption to retired federal employees (or to all retired employees), or by eliminating the exemption for retired state and local government employees. The latter approach, of course, could be construed as the direct imposition of a state tax, a remedy beyond the

power of a federal court. . . . The permissibility of either approach, moreover, depends in part on the severability of a portion of [the tax statute granting the exemption] from the remainder of the Michigan Income Tax Act, a question of state law within the special expertise of the Michigan courts. . . . It follows that the Michigan courts are in the best position to determine how to comply with the mandate of equal treatment.

109 S. Ct. at 1509.

In *McKesson*, the state legislature has already determined that the manner in which that state will comply with the constitutional mandate of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), is by eliminating the preferential tax treatment given to local products. The question of whether and how refunds should be made also should be determined by the state legislatures and state courts in accordance with principles of state law. Two factors support the appropriateness of such a ruling: (1) the complexity of the taxing structure at the state level and (2) a recognition that any holding requiring tax refunds could have a severe economic impact upon states other than the one before the Court.

Prospective and retrospective remedies are interwoven in tax cases. When a state tax statute is held unconstitutional, the state's decision concerning prospective and retrospective relief will be based to a great extent upon a balancing of the effect, together and separately, of both forms of remedy on the taxpayers and on the state. In determining the manner in which it will provide *prospective* relief, a state's decision to extend an exemption to one class or to repeal an exemption for another will depend upon that particular state's ability to accommodate an unexpected decrease in future revenues within its budget. A federal mandate of *retroactive* relief requiring the refund of taxes paid over a period of years may have an even greater financial impact on the state than a prospective remedy. Together, the impact could be devastating. A state may be confronted simultaneously with a loss of anticipated future revenues, the loss of reserves retained from past revenues, and the need to use current revenues to repay taxpayers for funds previously collected, budgeted or spent. Clearly, a state will be unable to determine its future course if it lacks control over past and current revenues. A decision that federal law mandates tax refunds from a state treasury removes from each state the critical ability to direct its financial future.

² Appendix A has been compiled solely to illustrate the extent of the potential impact on the states of refunds under *Davis*. It neither represents nor implies that any state listed has, in fact, any liability for refunds under *Davis*.

³ By late July 1989, at least twelve states had enacted legislation to alter the state income taxation of public employee retirement benefits: Arizona, Colorado, Iowa, Missouri, New York, North Dakota, Oklahoma, Oregon, South Carolina, Virginia, West Virginia, Wisconsin. See 54 *Tax Administrators News* 73 (July 1989).

The full impact of such a holding cannot be predicted.⁴ Even the possibility, however, that revenues collected under a presumptively constitutional state tax statute could, at some future point, be subject to refund by a federal rule established by this Court would pose a constant threat of disruption by the federal government of a state's fiscal planning. Such entanglement of the federal courts in state financial matters clearly is contrary to "the fundamental principle of comity between federal courts and state governments, . . . particularly in the area of state taxation." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 103 (1981). This principle is reflected in a long history of Court decisions and in the Tax Injunction Act itself, 28 U.S.C. § 1341. See *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) (The Tax Injunction Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operation."). See also *California v. Grace Brethren Church*, 457 U.S. 393, 410 n. 23 (1982) ("This Court has long recognized the dangers inherent in disrupting the administration of state tax systems."); *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 522 (1981) (imperative need of a State to administer its own fiscal operation was principal motivating force behind Tax Injunction Act).

Both the practical dangers inherent in a federal rule dictating the circumstances under which refunds must be paid from a state treasury and the strong federal policy favoring comity between federal courts and state governments support a decision protecting a state's tax system from unnecessary federal intervention. The Court should rely on the sound judgment, sense of fairness, and the ability of state legislatures and state courts to carefully tailor the appropriate circumstances for refunding state taxes. Perceived errors in the exercise of this judgment can be corrected through the taxpayers' use of the electoral process and through the economic pressures which can be exerted by both in-state and out-of-state interests.

⁴ A holding in a tax case often affects a large class of similarly situated taxpayers. The Virginia Department of Taxation estimates that Virginia alone has approximately 200,000 federal retirees, any or all of whom may argue that they are entitled to refunds of taxes paid prior to the amendment of the state's tax structure at a Special Session of Virginia's General Assembly called in response to this Court's decision in *Davis*. Source (for number of federal retirees): U.S. Dep't of Defense, *FY 1988 DOD Statistical Report on the Military Retirement System* 21 (1988); U.S. Office of Personnel Management, *Compensation Report: U.S. Civil Service Retirement System; Federal Employees Health Benefits Program; Federal Employees' Group Life Insurance Program; Pay Programs*, Exh. R13 (1985).

II. *If the Court Should Create a Federal Rule Mandating Refunds, the Court Should Narrowly Confine Such Ruling to the McKesson Facts*

Amici curiae support the argument of the respondents that when a state tax statute is found to be unconstitutional, a state may limit the relief to prospective relief only. If the Court determines, however, that federal law mandates refunds in *McKesson*, it should narrowly confine its holding to the facts presented in that case. Such a holding would require that (1) the taxpayer must pay under protest,⁵ (2) the tax must be found to violate clearly established law, and (3) the tax must violate the Commerce Clause.

The reasons for these conditions are several. First, if the tax violates clearly established law and if the taxpayer pays under protest, the state could be considered to have been put on notice that its revenues may not be secure from claims for refunds under the questioned statute. With such notice, the state could reasonably plan its use of revenue sources. Moreover, a statute found to violate the Commerce Clause arguably may affect out-of-state interests not always represented in the state legislature through the electoral process, which may justify an exception to the federal courts' general policy of non-intervention in a state's administration of its tax system.

In contrast, a state is justified in relying on a tax that taxpayers have paid voluntarily without protest and that does not violate clearly established law. Under these circumstances, the state has had no notice either from the taxpayer or from the courts that its statute may be unconstitutional and, thus, no reason to make emergency plans. Also, in contrast to taxpayers affected by Commerce Clause violations, taxpayers subject to state individual income taxation, such as the individual retirees in the states affected by *Davis*, are represented in the state legislature, and the special protection of the federal courts is unwarranted.

⁵ Amici curiae interpret the protest standard as a threshold requirement establishing that the state was on notice, not only regarding the constitutionality of one of its taxing statutes but also regarding the extent of any refunds that may be claimed. As such, retrospective relief would be available only to taxpayers who meet the payment-under-protest standard and only for the time period during which the taxpayer paid under protest. Further, the protest necessary to justify the possibility of retroactive relief for any taxpayer would be a type of protest that clearly puts the state on notice of a constitutional invalidity challenge and the possibility of refund. The filing of an amended return or other procedural form alone would not constitute such notice.

CONCLUSION

For the reasons stated, this Court should leave to the states the fashioning of an appropriate remedy when a taxation statute is declared unconstitutional. Alternatively, if the Court determines that federal law mandates retrospective relief in *McKesson*, such a decision should be narrowly drawn to apply only to a tax paid under protest and found to violate the Commerce Clause under clearly established law.

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APPENDIX A FISCAL IMPACT OF DAVIS

<u>State</u>	<u>Potential Refund Liability Under State Statute of Limitations Period¹</u>
Alabama	\$10.2 million
Arizona	\$261 million ²
Arkansas	\$28 million
Colorado	\$22.2 million
Georgia	\$200 to \$250 million
Iowa	\$30 to \$50 million
Kansas	\$50 million
Kentucky	\$50 million
Louisiana	\$21 million
Michigan	\$25 million
Mississippi	\$30 to \$35 million
Missouri	\$152 million
Montana	\$15 million
New Mexico	\$25 million
New York	\$35 million
North Carolina	\$140 million ³
Oklahoma	\$87 million
Oregon	\$150 to \$190 million
South Carolina	\$200 million
Utah	\$80 to \$100 million
Virginia	\$370.4 million
West Virginia	\$27 million
Wisconsin	\$103 million
TOTAL:	\$2.1 to \$2.25 billion

¹ All amounts are estimates, provided by each state's department of revenue or taxation or office of its Attorney General in response to a telephone survey conducted by the Virginia Office of the Attorney General.

² Under a State superior court order setting forth a formula to determine refunds, the State's potential liability may be substantially less than this figure.

³ Amount alleged by federal retirees to be in controversy in presently pending class action suit.

MOTION FILED
SEP 29 1989

No. 88-192

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

McKESSON CORPORATION,
Petitioner,

vs.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

**MOTION BY THE STATES OF CALIFORNIA, IDAHO,
MONTANA, NORTH DAKOTA, TEXAS, UTAH,
ARIZONA, HAWAII, MINNESOTA AND THE
DISTRICT OF COLUMBIA FOR LEAVE TO
FILE AMICUS CURIAE BRIEF OUT-OF-TIME**

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**MOTION FOR LEAVE TO FILE
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Amicus Curiae States Of California, Idaho, Montana, North Dakota, Texas, Utah, Arizona, Hawaii, Minnesota and the District of Columbia respectfully move for leave to file out-of-time their amicus curiae brief on reargument in support of respondents.

On July 3, 1989, the Court restored this case to the calendar for reargument. The due date for respondents' brief on the merits and an amicus curiae brief in support of respondents was September 20, 1989. The Amicus Curiae Brief On Reargument Of The States Of California, Idaho, Montana, North Dakota, Texas, Utah, Arizona, Hawaii, Minnesota and the District of Columbia In Support Of Respondents, submitted pursuant to Rule 36.4, was served by mail on September 21, 1989, one day out-of-time. The printer was instructed by Counsel of Record that the brief was due September 20, 1989. The brief was printed and dated September 20, 1989 but due to a misunderstanding by the printer, was not served until the next day, September 21, 1989. Counsel of Record was not aware of the problem until contacted by the Clerk of the Supreme Court on September 28, 1989.

Dated: September 29, 1989

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That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 190 Ninth Street, San Francisco, California 94103; that affiant served the required number of copies of the attached

Motion by the States of California, Idaho, Montana, North Dakota, Texas, Utah, Arizona, Hawaii, Minnesota and the District of Columbia for Leave to File Amicus Curiae Brief Out-of-Time, McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, et al and Numbered 88-192 on each of

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that each of said envelopes was then, on September 29, 1989, sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid; and that there is delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed.

All parties required to be served have been served.

Subscribed and sworn to before me

this 29 day of September 1989.

Jane Bourke
Notary Public in and for the City and County
of San Francisco, State of California



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

McKESSON CORPORATION,
Petitioner,

vs.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

**AMICUS CURIAE BRIEF ON REARGUMENT OF THE
STATES OF CALIFORNIA, IDAHO, MONTANA, NORTH
DAKOTA, TEXAS, UTAH, ARIZONA, HAWAII,
MINNESOTA AND THE DISTRICT OF COLUMBIA
IN SUPPORT OF RESPONDENTS**

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No. 88-192

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OF THE

United States

OCTOBER TERM, 1989

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IN SUPPORT OF RESPONDENTS

INTRODUCTION

On July 3, 1989, the Court restored this case to the calendar for reargument and directed the parties to brief and argue the following questions:

1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?
2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to

discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

On February 21, 1989, the brief of amici curiae California, Idaho, Montana, North Dakota, Texas and Utah was filed in this case. While that brief addressed some of the questions now raised by the Court in its order restoring the case to calendar, amici respectfully submit this brief on reargument, in support of respondent, to address further the Court's two questions. The following States join California in this brief: Idaho, Montana, North Dakota, Texas, Utah, Arizona, Hawaii, Minnesota and the District of Columbia.

SUMMARY OF ARGUMENT

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) this Court established a three-pronged test for governing consideration of whether to impose a civil decision prospectively or retroactively. The first question by the Court assumes a state tax statute violates clearly established law, thus not satisfying the first factor of *Chevron*. However, no individual factor is automatically controlling and all three *Chevron* factors must be considered to determine whether retrospective relief must be provided by a State. Where a consideration of the second and third factors of *Chevron* leads to the conclusion that retrospective relief is not appropriate, the State may elect to provide only prospective relief.

The second question presupposes that a tax is found to be unconstitutionally discriminatory. Such discrimination may be remedied by retroactively taxing those who benefited from the discrimination. The mandate of equal treatment enunciated in *Davis v. Michigan*, ___ U.S. ___, 103 L.Ed.2d 891 (1989) is satisfied if this retroactive taxation reaches back a reasonable time, certainly no greater than the time under State law when a taxpayer may file an amended state tax return and when the State may notify a taxpayer of additional proposed tax due.

ARGUMENT

I

THE *CHEVRON* STANDARD WHICH CONTROLS THESE CASES ALLOWS A STATE TO ELECT TO PROVIDE ONLY PROSPECTIVE RELIEF WHEN A TAXPAYER PAYS UNDER PROTEST A STATE TAX FOUND TO VIOLATE CLEARLY ESTABLISHED LAW UNDER THE COMMERCE CLAUSE

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court established a three-pronged test for governing consideration of whether to impose a civil decision prospectively or retroactively. Amici believe the *Chevron* standard is still valid and should be applied to this case.

As the first factor is stated in *Chevron*, "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted]." 404 U.S. at 106. The first question currently posed by the Court assumes a State tax statute violates clearly established law, thus not satisfying the first factor of *Chevron*. The question then asks whether in these circumstances the State "must" provide some form of retrospective relief. Amici respond that the answer to this question is "no", and that simply addressing individually the first factor of *Chevron* does not resolve the retroactive/prospective issue. Instead, all three factors must be considered prior to determining whether retrospective relief must be provided by a State. Accordingly, in those cases where a consideration of the second and third factors of *Chevron* leads to the conclusion that retrospective relief is not appropriate, a State may elect to provide only prospective relief.

Amici's argument on this point is set forth fully at pages six through nine of its amici curiae brief filed on February 21, 1989, in this matter. For the convenience of the Court, that argument will be repeated here in substantially the same form.

The First *Chevron* Factor, That of Whether a New Principle of Law is Established, is Not a Threshold For Prospective Application

Amici urge the Court to interpret and clarify the *Chevron* test so as to require an examination and balancing of all three factors. The Court has never held that the first factor of *Chevron* is a threshold requirement for prospectivity. In both *Chevron* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), the Court found all three *Chevron* factors militated against retroactivity and thus did not specifically address the issue of what weight is to be given to any particular factor.¹

Amici urge the Court to adopt the view expressed by several Circuits that no single factor, including the first prong of *Chevron*, is determinative on the retroactivity question. That view was succinctly summarized in *Jones v. Consolidated Freightways Corp.* 776 F.2d 1458 (10th Cir. 1985), where the Tenth Circuit explained the application of the *Chevron* standard as follows:

¹ Justice Stewart, author of the *Chevron* opinion, did state the issue of retroactivity "is not even presented unless the decision in question marks a sharp break in the web of the law" and "the issue is presented only when the decision overrules clear past precedent." *Milton v. Wainwright*, 407 U.S. 371, 381 n. 2 (1972) (Stewart, J., dissenting). However, *Milton* was a criminal (not civil) case, the majority did not address the retroactivity issue, and Justice Stewart did not even cite to *Chevron* in his dissent. Also, in *United States v. Johnson*, 457 U.S. 537, 550 n. 12 (1982), Justice Blackmun stated in a footnote that in the civil context, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. However, once again, the statement was made in the context of a criminal (not civil) case. It should be noted that the use of the term "must" in the *Chevron* statement of the first factor is balanced by the use of the word "must" in the second factor, which indicates that "we *must* . . . weigh the merits and demerits in each case" in determining whether retrospective application will further or retard the operation of the rule in question. 404 U.S. at 106-107 (emphasis added). If the first factor were a threshold test, the second factor would not result in a weighing "in each case."

"A proper assessment under *Chevron Oil* focuses upon the relative significance of the individual *Chevron* factors. It is not necessary that each factor compel prospective application. [Citations omitted.] While non-retroactivity generally depends upon the existence of past precedent, [citation omitted] 'the final determination involves pulling together the three factors for a careful balancing.' [Citation omitted.]" 776 F.2d at 1460-1461.

Jones is consistent with the language of *Chevron* where the Court specifically stated that in cases dealing with the nonretroactivity question, it has "generally considered three separate factors," and concluded that "upon consideration of each of these factors" that prospective application was proper. *Chevron*, 404 U.S. at 106-107, emphasis added. Petitioner would interpret this language to mean that only where the first prong is satisfied would an examination under the second and third factors take place. Such an interpretation, however, is in direct conflict with the plain language of *Chevron* which speaks of considering not one, but three, factors. To interpret *Chevron* as petitioner does would nullify the need for a three-factor test and would relegate the important considerations of purpose and inequity, the second and third *Chevron* factors, to second class status, to be examined only if and when the Court has found under the first prong of *Chevron* that a new principle of law has been established.

Amici urge the Court not only to reject the "threshold" approach suggested by petitioner, but also to recognize that after considering and balancing all three factors, nonretroactivity may be supported by a finding under *only one* of the three *Chevron* factors. Such an approach was followed by the First Circuit in *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982), affirmed on other grounds, 462 U.S. 650 (1983), where the court found neither the first nor the second *Chevron* factors required nonretroactive application of the decision in issue. The court in *Fernandez* then stated "[w]e might still find retroactivity barred if it would produce substantially inequitable results, the third *Chevron Oil* factor." 681 F.2d at 52 (emphasis added). Similarly, the Tenth Circuit in *Jones v. Consolidated Freightways Corp.*, *supra*, 776 F.2d at 1460 remarked, "[a] proper assessment under *Chevron*

Oil focuses upon the relative significance of the individual *Chevron* factors. It is not necessary that each factor compel prospective application."²

The Eleventh Circuit reached the same conclusion in *Ackin-close v. Palm Beach County, Fla.*, 845 F.2d 931 (11th Cir. 1988), where the court stated, at page 935, "[i]n the final component of the *Chevron* analysis we are instructed that if retroactive application of a decision of the Court would produce substantial inequitable results, a holding of non-retroactivity is implied."³

² Citing to *Mitchell v. City of Sapulpa*, 857 F.2d 713, 716 (10th Cir. 1988), petitioner McKesson states the Tenth Circuit is one of the federal Circuits which has "expressly viewed *Chevron's* first prong as a threshold test that must be met before the presumption of retroactivity can be overcome." McKesson Brief at 34, n. 9. Amici disagree with this statement. Page 716 of *Mitchell*, which is cited to by petitioner, discusses the applicability of the *Johnson* standard for retroactivity in criminal cases. The court at page 717 of *Mitchell* then concludes the *Chevron* (not *Johnson*) standard is to be applied, and goes on to examine each of the three *Chevron* factors. Nowhere in *Mitchell* does the Tenth Circuit state that the first prong of *Chevron* is a threshold test, and such a reading of *Mitchell* is consistent with *Jones*. While the Tenth Circuit in *Jones* did comment that nonretroactivity "generally" depends upon the existence of clear past precedent, *Jones* explicitly states the final determination involved "pulling together the three factors for a careful balancing," and explicitly states that it is not necessary for each factor to compel prospective application. 776 F.2d at 1460-1461.

³ Citing to *Acoff v. Abston*, 762 F.2d 1543, 1548, n. 6 (11th Cir. 1985), Petitioner McKesson stated the Eleventh Circuit is one of the Federal Circuits which has "expressly viewed *Chevron's* first prong as a threshold test that must be met before the presumption of retroactivity can be overcome." McKesson Brief at 34, n. 9. Amici dispute this statement. The footnote reference in *Acoff* clearly states the court is applying the *Johnson*, not *Chevron*, standard, so any reference in *Acoff* to how the *Chevron* standard should be applied is dicta. That dicta is clearly inconsistent with the subsequent opinion of the Eleventh Circuit in *Ackin-close* which states that all three *Chevron* factors are relevant, and that it is "implied" from *Chevron* that a holding of nonretroactivity can be based solely upon a finding under the third prong of *Chevron* that

This approach followed by the First Circuit in *Fernandez*, the Tenth Circuit in *Jones*, and the Eleventh Circuit in *Ackin-close* not only rejects the first prong of *Chevron* as a "threshold" test, but also recognizes, consistent with *Chevron*, that the prospectivity question requires an analysis of all three factors. Under this approach, which amici urge the Court to adopt, prospective application may be found proper upon a finding of a single *Chevron* factor. Thus, a State may elect to provide only prospective relief where a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause.

II

A STATE MAY, IN PRINCIPLE, CONSISTENTLY WITH THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT, REMEDY THE EFFECTS OF A TAX FOUND TO DISCRIMINATE AGAINST AN INTERSTATE BUSINESS IN VIOLATION OF THE DORMANT COMMERCE CLAUSE BY RETROACTIVELY RAISING THE TAXES OF THOSE WHO BENEFITED FROM THE DISCRIMINATION

The Court, on the several occasions where this issue has been addressed, has clearly recognized that consistent with due process limitations, retroactive taxation is permitted. *Cooper v. United States*, 280 U.S. 409, 411-412 (1930); *Milliken v. United States*, 283 U.S. 15, 21 (1931); *United States v. Hudson*, 299 U.S. 498, 500-501 (1937); *Welch v. Henry*, 305 U.S. 134, 147 (1938); *United States v. Darusmont*, 449 U.S. 292, 296-298 (1981); *United States v. Hemme*, 476 U.S. 558, 568-569 (1986). Indeed, it is well settled that "a tax is not necessarily unconstitutional because retroactive." *Welch v. Henry*, 305 U.S. at 146. Following the approach most recently taken in *Hemme*, the Court must "consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limita-

retroactive application would produce substantial inequitable results. *Ackin-close*, 845 F.2d at 935.

tion." 476 U.S. at 568-569, quoting from *Welch v. Henry*, 305 U.S. 134, 147.

Petitioner McKesson recognizes that some retrospective effect is not necessarily fatal to a revenue law under the due process clause. However, McKesson frames the outside parameters of the states' retrospective powers as being inextricably bound to the mere passage of time, and concludes that only where a state acts "promptly" does it have the option of remedying discrimination by retroactively equalizing the tax burden. (Brief for Petitioner McKesson on Reargument p. 24-25.) Petitioner concludes the time has now passed for Florida to impose a remedial retroactive tax since the retroactive statute would have to reach back and tax transactions that occurred five years ago. (Brief for Petitioner on Reargument p. 28.)

Petitioner errs in analyzing the propriety of retroactive application as turning solely on the temporal issue. Certainly the issue is an important one, and the cases which have examined the retrospective issue have not ignored the issue of timing. E.g., *United States v. Darusmont*, 449 U.S. at 296-297 ("short and limited periods"); *United States v. Hudson*, 299 U.S. at 501 (35-day period "not unreasonable"); *Welch v. Henry*, 305 U.S. at 147-148 (two-year retroactivity period reasonable). But timing is merely one of the "circumstances" to be considered under *Hemme*, 476 U.S. at 568, and certainly should not be considered the controlling factor. Moreover, the timing issue under the due process analysis should not be decided by looking to the time frame necessary for the state to remove and equalize *all* the tax burden. Equalizing all the tax burden is not constitutionally required, as recently illustrated by *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 103 L.Ed.2d 891 (1989).

The Court in *Davis* held invalid a Michigan statute exempting from income taxation all retirement benefits paid by the State or its political subdivisions, but levying an income tax on retirement benefits paid by all other employers, including the Federal Government. Relying upon *Heckler v. Mathews*, 465 U.S. 728, 740 (1984), the Court in *Davis* stated that the Constitution does not require such a drastic solution as the invalidation of Michigan's income tax law in its entirety, and stated that "[w]e have

recognized, in cases involving invalid classifications in the distribution of government benefits, that the appropriate remedy 'is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.' " *Id.* ___ U.S. at ___, 103 L.Ed.2d at 906, citations omitted, emphasis in original. The Court further stated that Davis' claim "could be resolved either by extending the tax exemption to retired federal employees (or to all retired employees), or by eliminating the exemption for retired state and local government employees." ___ U.S. at ___, 103 L.Ed.2d at 907.

The significance of *Davis* is that both the referenced standard of a "mandate of equal treatment" by the withdrawal of benefits from the favored class, and the proposed resolution of Davis' complaint by eliminating the exemption for retired state and local government employees, speak in terms of requiring only present, not retroactive, state action. Thus, *Davis* impliedly stands for the proposition that in tax cases, a due process violation may be cured by removing something less than *all* benefits received at *all* times by *all* members of the favored class. This proposition is consistent with the Court's longstanding recognition that the wrongs to victims of a discriminatory government program may be remedied by ending preferential treatment for others, a remedy which recognizes it is neither constitutionally required nor feasible to require fully retroactive removal of the preferential treatment from the benefited class. See *Heckler v. Mathews*, *supra*, 465 U.S. 728, 740; *Gilmore v. City of Montgomery*, 417 U.S. 556, 566-567; *Norwood v. Harrison*, 413 U.S. 455, 470-471 (1973).

Because the removal of all the benefits from the preferred class is not required in order to satisfy due process, petitioner errs in automatically concluding Florida must reach back to the effective date of the Revised Florida Products Exemption statute which petitioner challenges in this action in order to retroactively equalize the taxes on interstate and local products. Nothing in either *Davis* or *Heckler*, or the cases cited therein, requires that a "mandate of equal treatment" is *only* achieved when 100% of the benefits are withdrawn from 100% of the favored class during the entire life of the statute.

It should not be necessary for Florida to reach back five years to provide a mandate of equal treatment, solely on the theory a State must reach back and ameliorate all benefits conferred since the date an unconstitutional statute became effective. Both due process and the Commerce Clause should be satisfied with a "mandate of equal treatment" reaching back a reasonable time. This "reasonable time" standard is not a "bright-line" test and provides no firm guidelines. In most cases, however, a reasonable time presumptively should be no greater, and often less, than the statute of limitations under State law which controls when a taxpayer may file an amended state tax return and when the State may notify a taxpayer of additional proposed tax due. Such State statutes of limitations have been accorded deference by the Court in other contexts, and should be accorded deference in this setting as well.

Statutes of limitations "find their justification in necessity rather than in logic", and are practical and pragmatic devices to spare the courts from litigation of stale claims, and citizens from being put to their defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). They are not simply technicalities, but "have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). It is also well settled that "[a] constitutional claim can become time barred just as any other claim can." *Block v. North Dakota*, 461 U.S. 273, 292 (1983). Statutes of limitations are best left to legislative determination and control and, normally, therefore, States are free to set periods of limitation without fear of violating some provision of the Constitution. *Mills v. Habluetzel*, 456 U.S. 91, 101 n. 9 (1982).

This reasonable time standard, which is based upon the State statute of limitations as a presumptive *maximum* time, balances the interests of a taxpayer aggrieved under the Commerce Clause to receive a mandate of equal treatment; the interests under the Due Process Clause of those who benefited from discrimination and will be subjected to retroactive raises in taxes by the State; and the fiscal interests of the State, which is always a critical

inquiry in any retroactivity analysis. See *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722 (1978); *Florida v. Long*, 487 U.S. ____ (1988) 108 S.Ct. 2354, 2361-2363; *Camden I. Condominium Assn. Inc. v. Dunkle*, 805 F.2d 1532, 1535 (11th Cir. 1986), cert. den. 107 S.Ct. 3266 (1987). Applying this standard to this case, any Commerce Clause injury to petitioner arising under the Florida statute can be cured, at the election of the State and consistent with due process, not only by a refund to petitioner, but alternatively also by the withdrawal by Florida of benefits from the favored class by retroactive taxation covering a reasonable period of time, not to exceed the time in which Florida can propose for past years additional deficiency assessments under the Florida statute of limitations.

CONCLUSION

For the reasons stated, this Court should affirm the validity of *Chevron*, reject the argument that the first prong of *Chevron* is a threshold for prospectivity, and hold that removal of benefits from a favored class for a reasonable retrospective period of time is a sufficient alternative remedy which is consistent with the Due Process Clause of the 14th Amendment.

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